TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 204.

CHARLES SCRIBNER AND ARTHUR H. SCRIBNER, TRADING AS CHARLES SCRIBNER'S SONS, APPELLANTS,

vs.

ISIDOR STRAUS AND NATHAN STRAUS, INDIVIDUALLY AND AS COPARTNERS TRADING UNDER THE NAME OF R. H. MACY & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 15, 1907.

(20,536.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1907.

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a United States Circuit Court of Appeals for the Second Circuit.

CHARLES SCRIBNER and ARTHUR SCRIBNER, Trading as Charles Scribner's Sons, Complainants-Appellants,

vs.

ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy & Company, Defendants-Appellees.

Transcript of Record.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Oct. 11, 1905. William Parkin, clerk.

1 *Subpœna.*

The President of the United States of America to Isidor
[SEAL.] Straus and Nathan Straus, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of December, A. D. 1903, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said court by Charles Scribner and Arthur H. Scribner, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 10th day of November, in the year of our Lord one thousand nine hundred and three, and of the independence of the United States of America, the one hundred and twenty-eighth.

JOHN A. SHIELDS, *Clerk.*

STEPHEN H. OLIN,
32 *Nassau Street, Solicitor for Complainant-.*

The defendants are required to enter appearance in the above cause, in the Clerk's office of this court, on or before the first Monday of December, 1903, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

Endorsed: U. S. Circuit Court. Filed Nov. 10, 1903. Southern District New York, John A. Shields, Clerk.

Circuit Court of the United States for the Southern District of New York. In Equity.

To the Honorables the Judges of the United States Circuit Court for the Southern District of New York:

Charles Scribner and Arthur H. Scribner, residents of the City of New York, having a regular and established place of business in the City of New York, Borough of Manhattan, State of New York, individually and as co-partners trading under the firm name and style of Charles Scribner's Sons, bring this their bill of complaint against Isidor Straus and Nathan Straus, residents of the Borough, City and State aforesaid, having a regular and established place of business in the said Borough of Manhattan, individually and as co-partners trading under the firm name and style of R. H. Macy & Co., Defendants.

And thereupon your orators complain and say:

I. Your orators have been engaged for many years in the business of printing, manufacturing, publication and sale of books and have from time to time printed, published and sold great numbers of books under the protection of the copyright law of the United States when the same was applicable, and they have large offices, shops and stores used in such business, and large capital employed therein.

II. The defendants under their firm name or style of R. H. Macy & Co. have at all the times hereinafter mentioned carried on and now carry on a department store at which they sell books including those copyrighted and published by your orators.

III. Prior to the year 1900 your orators and other publishers were accustomed to advertise and offer for sale books at prices known as "list prices" and sellers of such books at retail, sometimes disposed of such books at such list prices and sometimes allowed dis-
3 counts and rebates from the list prices which discounts and rebates were not known to all and varied with different customers and purchasers.

IV. This system of selling books was unsatisfactory as well to the purchasing public as to the retail dealer and the jobber in its lack of uniformity and certainty and was injurious to the book trade, and, therefore, your orators and certain other publishers in the year 1900 formed an association for the benefit of the book trade, which was duly incorporated under the laws of the State of New York, under the name of the American Publishers' Association. The said Association has not attempted to fix and had no authority to fix the prices which the members of the Association shall charge for the books, published by them, and has not in any way attempted to limit and has no authority to limit the supply of books to the public.

Such Association has not attempted to limit and has no authority to limit the supply of books by its members to all jobbers and booksellers who will comply with the rules of the Association, and the

members of the Association have dealt and are dealing indiscriminately with all jobbers and dealers who comply with the rules of the Association.

And the members of the Association continue to carry on business in unrestrained competition with each other and with other publishers, both as to the prices and quantities of books published by them respectively.

V. The said American Publishers' Association has made certain rules for the protection of the purchasing public, intended to provide that all purchasers of books at retail (except public libraries) shall be able to buy copyrighted books at the same price without secret or other discounts or rebates. A copy of the said rules adopted by the said Publishers' Association on or about February 13, 1901 (as amended by resolutions adopted January 8, 1902, and May 27, 1902), is hereto annexed as a part of this bill, marked "Exhibit A."

VI. From and after the adoption of the said rules your orators have at all times refused and now refuse to sell without restriction any of the copyright books published by them and affected by the said rules, except such of said books as have been sold by your
4 orators at retail for the full "net price" fixed for such books respectively. Excepting the sales so made at retail for the full net price, your orators have sold none of the copyright books so as aforesaid published by them including the copyright books hereinafter particularly specified, except upon the condition and with the restriction that the purchaser of such books should take and hold the same subject to the said rules of the American Publishers' Association, and your orators have sold copyright books published by them to those booksellers only who would maintain the retail net price of such net copyrighted books fixed by your orators, for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name should be given to them by the said American Publishers' Association, as one who cut such net prices, and who would not sell copyrighted works of fiction (not net) published after February 1st, 1902, within a year of publication at retail at a discount exceeding 28 per cent. from the price fixed by the publishers. And your orators say that except for the above-mentioned sales by them at retail at net prices they have not sold any of their said net copyrighted books and copyrighted books of fiction published after February 1st, 1902 (including those hereinafter specified), by an unrestricted sale, and that they have sold such books only to jobbers and dealers on condition that prices be maintained as provided by the regulations of the American Publishers' Association.

VII. And your orators have published at the head of each catalogue and price list of books issued by them, and upon each and every bill of goods and invoice given upon sales of books the following notice:

"Copyrighted NET books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on con-

dition that prices be maintained as provided by the regulations of the AMERICAN PUBLISHERS' ASSOCIATION."

VIII. That your orators heretofore, and on or about the dates mentioned, took out certain copyrights, as herein more specifically stated:

1. Before the sixteenth day of September, 1903, one Captain F. S. Brereton wrote and composed a book which was entitled "In the Grip of the Mullah." That on or about the sixteenth day of September, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-1, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the eighteenth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "In the Grip of the Mullah," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-1, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty cents.

2. Before the sixteenth day of September, 1903, one Rufus B. Richardson wrote and composed a book entitled "Vacation Days in Greece." On or about the sixteenth day of September, 1903, your

orators, under an agreement with the author, being the sole and exclusive proprietors and holders of the said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian who then and there recorded said title, as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-2, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this bill.

Your orators further say that on or about the eighteenth day of September, 1903, at the City of New York aforesaid, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said book, "Vacation Days in Greece," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, which paper your orators pray may be taken as a part of this bill; that said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts
7 of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright aforesaid, the sole and exclusive right and liberty to print, publish and vend the said book.

Your orators further show that the said "Vacation Days in Greece," was published as a "net book," under the rules of the American Publishers' Association, to be sold at the net price of two dollars.

3. Before the second day of September, 1903, one Frederick Palmer wrote and composed a book entitled "The Vagabond," and on or about the second day of September, 1903, your orators, under agreement with the said author, being the sole and exclusive proprietors and holders of the said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title, as required by the said acts, a certificate and record in the form re-

quired by said acts, containing the title of said book. The paper hereto annexed, marked VIII-3, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the fourth day of September, 1903, at the City of New York aforesaid, within the United States aforesaid, and before the publication of said book your orators deposited in the mail addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said "The Vagabond," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for said two copies is hereto attached, which paper your orators pray may be taken as a part of this bill. The said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within
8 the limits of the United States, and your orators gave information and notice of the copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediate- following, the following words: "Copyright, 1903, by Collier's Weekly; copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of said acts of Congress necessary to secure the benefit of copyright to your orators. And your orators show that in and by the aforesaid deposit they intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright aforesaid, the sole and exclusive right and liberty to print, publish and vend the said book.

Your orators further show that the said book was a work of fiction, issued at the price of one dollar and fifty cents, and by the above-mentioned rules of the American Publishers' Association could not be lawfully sold for less than one dollar and eight cents.

4. Prior to May 15th, 1903, Thomas Nelson Page wrote and composed a certain book called "Gordon Keith," and on or about May 15th, 1903, your orators, being under agreement with the author, the sole and exclusive proprietors and holders of the said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title, as required by the said acts, a certificate and record in the form required by said acts containing the title of said book. That the paper hereto annexed, marked VIII-4, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the 25th day of May, 1903, at the City of New York aforesaid, within the United States aforesaid, and before the publication of said book, your orators de-

posited in the mail, addressed to the Librarian of Congress,
9 at Washington, in the District of Columbia, two copies of the said book for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, which paper your orators pray may be taken as a part of this bill. That said two copies of the said bill, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons. All rights reserved," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators. And your orators show that, in and by the aforesaid deposit, they intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyrights aforesaid, the sole and exclusive right and liberty to print, publish and vend the said book.

Your orators further say that the said book was a work of fiction, and under the aforesaid rules of the American Publishers' Association was sold at the price of one dollar and fifty cents, and pursuant to such rules could not lawfully be sold at retail for less than one dollar and eight cents.

5. Prior to the second day of September, 1903, one John Fox, Jr., wrote and composed a certain book entitled "The Little Shepherd of Kingdom Come." On or about the second day of September, 1903, your orators, being by agreement with the said author, sole and exclusive proprietors and holders of the said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title, as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-5,
10 is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say, that on or about the 4th day of September, 1903, at the City of New York aforesaid, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said book "The Little Shepherd of Kingdom Come," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, which paper your orators pray may be taken as a part of this bill. That said two

copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators. And your orators show that, in and by the aforesaid deposit, they intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright aforesaid, the sole and exclusive right and liberty to print, publish and vend said book.

Your orators further show that the said book "The Little Shepherd of Kingdom Come," was published as a work of fiction at the price of one dollar and fifty cents, and in pursuance of the rules of the American Publishers' Association aforesaid, could not be sold at retail for less than one dollar and eight cents.

6. Prior to September 30, 1903, one F. Hopkinson Smith wrote and composed a book entitled "Colonel Carter's Christmas." On or about the thirtieth of September, 1903, your orators, being the sole and exclusive proprietors and holders of the said book, under agreement with the author thereof (said book never having been published), took out a copyright therefor in the United States,
11 by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title, as required by the said Acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-6, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, and which said paper your orators pray may be taken as a part of this bill.

Your orators further say, that on or about the 8th day of October, 1903, at the City of New York aforesaid, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said "Colonel Carter's Christmas," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, which paper your orators pray may be taken as a part of this bill. That said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of the copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators. And your orators show that, in

and by the aforesaid deposit, they intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright aforesaid, the sole and exclusive right and liberty to print, publish and vend the said book.

And your orators further show that the said book is a work of fiction, published at the price of one dollar and fifty cents, and in accordance with the said rules of the American Publishers'
12 Association could not be sold at retail for less than one dollar and eight cents.

VIII-7. Before the twenty-sixth day of June, 1903, one Dwight W. Huntington wrote and composed a book, which was entitled "Our Feathered Game." That on or about the twenty-sixth day of June, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed marked VIII-7, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-seventh day of June, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said book "Our Feathered Game," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-7, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had
13 intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regu-

lations of the American Publishers' Association, at the net price of Two dollars.

VIII-8. Before the 12th day of February, 1903, one John C. Van Dyke wrote and composed a book, which was entitled: "The Meaning of Pictures." That on or about the twelfth day of February, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-8, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twelfth day of February, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Meaning of Pictures," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-8, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following
14 words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-9. Before the 26th day of February, 1903, one Henry James wrote and composed a book, which was entitled: "The Better Sort." That on or about the twenty-sixth day of February, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the

United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-9, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-sixth day of February, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Better Sort," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-9, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-10. Before the 25th day of February, 1903, one Arthur Cosslett Smith wrote and composed a book, which was entitled: "The Turquoise Cup and the Desert." That on or about the 25th day of February, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-10, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-second day of February, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book,
16 your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Turquoise Cup and the Desert," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-10, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-11. Before the 12th day of March, 1903, one Sewell Ford wrote and composed a book, which was entitled: "Horses Nine." That on or about the 12th day of March, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-11, is a true copy of such certificate and record, and of the record duly made by the
17 said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the fourteenth day of March, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Horses Nine," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, *one J. Lawrence Laughlin wrote and composed a* marked VIII-11, which paper your orators pray may be taken as

a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-12. Before the 14th day of March, 1903, one J. Lawrence Laughlin wrote and composed a book, which was entitled: "The Principles of Money." That on or about the 14th day of March, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book is the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of
18 Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-12, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the fourteenth day of March, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Principles of Money," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-12, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and

did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of three dollars.

VIII-13. Before the 26th day of March, 1903, one Frances Powell wrote and composed a book, which was entitled: "The House on the Hudson." That on or about the twenty-sixth day of March, 1903, your orators, under their said firm name of Charles Scribner's Sons,
19 being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-13, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-seventh day of March, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The House on the Hudson," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-13, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

20 VIII-14. Before the ninth day of April, 1903, one E. W. Hornung wrote and composed a book, which was entitled: "No Hero." That on or about the ninth day of April, 1903, your

orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-14, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the ninth day of April, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "No Hero," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-14, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right
21 and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-15. Before the ninth day of April, 1903, one Harriet L. Keeler wrote and composed a book, which was entitled "Our Northern Shrubs." That on or about the ninth day of April, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said

book; that the paper hereto annexed, marked VIII-15, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the ninth day of April, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Our Northern Shrubs," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-15, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the follow words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the
22 said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of two dollars.

VIII-16. Before the 22nd day of April, 1903, one Josephine Daskam, wrote and composed a book, which was entitled: "Middle Aged Love Stories." That on or about the twenty-second day of April, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-16, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-fourth day of April, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Wash-

ington, in the District of Columbia, two copies of the said book, "Middle Aged Love Stories," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-16, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators
23 gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-17. Before the 22nd day of April, 1903, one H. E. Parkhurst wrote and composed a book, which was entitled: "Trees, Shrubs and Vines." That on or about the twenty-second day of April, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-17, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-fourth day of April, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington in the District of Columbia, two copies of the said book, "Trees, Shrubs and Vines," for the purpose of effecting copyright
24 of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, Marked VIII-17, which paper your orators pray may be take- as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said

book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators, and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

VIII-18. Before the twenty-ninth day of April, 1903, one Alice Duer Miller wrote and composed a book, which was entitled: "The Modern Obstacle." That on or about the twenty-ninth day of April, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-18, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the thirtieth day of April, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Modern Obstacle," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-18, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and

vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

VIII-19. Before the 13th day of May, 1903, one Mary King Waddington wrote and composed a book, which was entitled: "Letters of a Diplomat's Wife." That on or about the thirteenth day of May, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required
26 by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-19, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the sixteenth day of May, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Letters of a Diplomat's Wife," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-19, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of two dollars and fifty cents.

VIII-20. Before the fifteenth of May, 1903, one F. Hopkinson Smith wrote and composed a book, which was entitled: "The Under Dog." That on or about the fifteenth day of May, 1903, your orators, under the said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book

(said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the
27 title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-20, is a true copy of such certificate and record and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-second day of May, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Under Dog," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-20, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

VIII-21. Before the 2nd day of September, 1903, one Cyrus Townsend Brady wrote and composed a book, which was entitled:
"A Doctor of Philosophy." That on or about the second day
28 of September, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper

hereto annexed, marked VIII-21, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the fourth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "A Doctor of Philosophy," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-21, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

29 VIII-22. Before the 16th day of September, 1903, one Cyrus Townsend Brady wrote and composed a book, which was entitled: "In the War with Mexico." That on or about the sixteenth day of September, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-22, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the seventeenth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Wash-

ington, in the District of Congress, two copies of the said book, "In the War with Mexico," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-22, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of three dollars.

VIII-23. Before the sixteenth day of September, 1903, one Captain F. S. Brereton wrote and composed a book, which was entitled: "Foes of the Red Cockade." That on or about the 16th day of September, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-23, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the eighteenth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Foes of the Red Cockade," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-23, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words:

"Copyright, 1903, by Charles Scribner's Sons," complying
31 with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of two dollars.

VIII-24. Before the twenty-second day of October, 1903, one Josephine Daskam wrote and composed a book, which was entitled: "Poems."

That on or about the twenty-second day of October, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-24, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-third day of October, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Poems," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-24, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book,
32 so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction,"

under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-25. Before the 30th day of September, 1903, one Paul Du Chaillu wrote and composed a book, which was entitled: "In African Forest and Jungle." That on or about the thirtieth day of Sept., 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-25, is a true copy of such certificate and record and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the thirtieth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at
33 Washington, in the District of Columbia, two copies of the said book, "In African Forest and Jungle," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-25, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

VIII-26. Before the ninth day of October, 1903, one W. A. Fraser wrote and composed a book, which was entitled: "The Blood Lilies." That on or about the ninth day of October, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the

office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-26, is a true copy of such certificate and record and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

34 Your orators further say that on or about the eighth day of October, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Blood Lilies," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-26, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sale and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

VIII-27. Before the nineteenth day of October, 1903, one Charles Dana Gibson wrote and composed a book, which was entitled: "The Weaker Sex."

That on or about the nineteenth day of October, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate

35 and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-27, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the nineteenth day of October, 1903, at the City of New York, within the United States aforesaid and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "The Weaker Sex," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-27, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of four dollars and twenty cents.

VIII-28. Before the fifteenth day of October, 1903, one John B. Gordon wrote and composed a book, which was entitled: "Reminiscences of the Civil War." That on or about the 15th day of October, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office
36 of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-28, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the sixteenth day of October, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Reminiscences of the Civil War," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-28, which paper your orators pray may be taken as a part of this bill. Said two copies of the said

book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress, relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of three dollars.

VIII-29. Before the sixteenth day of September, 1903, one G. A. Henty wrote and composed a book, which was entitled: "With the Allies to Pekin." That on or about the sixteenth day of
37 September, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-29, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the eighteenth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators, deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "With the Allies to Pekin," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-29, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended

to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published
38 by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-30. Before the sixteenth day of September, 1903, one G. A. Henty wrote and composed a book, which was entitled: "Through Three Campaigns." That on or about the sixteenth day of September, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by the said acts, containing the title of said book; that the paper hereto annexed, marked VIII-30, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the seventeenth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Through Three Campaigns," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-30, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of
39 copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of three dollars.

VIII-31. Before the thirtieth day of September, 1903, one Elizabeth Hill wrote and composed a book, which was entitled: "My Wonderful Visit." That on or about the thirtieth day of September,

1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-31, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the eighth day of October, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "My Wonderful Visit," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-31, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price one dollar and twenty cents.

VIII-32. Before the 15th day of October, 1903, one Montague Howard wrote and composed a book, which was entitled: "Old London Silver." That on or about the fifteenth day of October, 1903, your orators, under their firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published, took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book;

that the paper hereto annexed, marked VIII-32, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the sixteenth day of October, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Old
41 London Sort," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-32, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "net book," under the said regulations of the American Publishers' Association, at the net price of twelve dollars and fifty cents.

VIII-33. Before the fifteen- day of October, 1903, one W. W. Jacobs wrote and composed a book, which was entitled: "Odd Craft." That on or about the fifteenth day of October, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-33, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

42 Your orators further say that on or about the sixteenth day of October, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said book, "Odd Craft," for the purpose of effecting copyright of the

same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-33, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

VIII-34. Before the 12th day of September, 1903, one Brander Matthews wrote and composed a book, which was entitled: "The Development of the Drama." That on or about the twelfth day of September, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of
43 the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-34, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twelfth day of September, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said book, "The Development of the Drama," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-34, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the follow-

COPY

ing words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as a "net book," under the said regulations of the American Publishers' Association, at the net price of one dollar and twenty-five cents.

VIII-35. Before the ninth day of October, 1903, one Frank H. Spearman wrote and composed a book, which was entitled: "The Daughter of a Magnate." That on or about the ninth day of October, 1903, your orators, under their said firm name of Charles
44 Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-35, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the ninth day of October, 1903, at the City of New York, within the United States aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said book, "The Daughter of a Magnate," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-35, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the

sole and exclusive right and liberty to print, publish and
45 vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

VIII-36. Before the 22nd day of October, 1903, one Edith Wharton wrote and composed a book, which was entitled: "Sanctuary." That on or about the twenty-second day of October, 1903, your orators, under their said firm name of Charles Scribner's Sons, being thereto authorized by agreement with the said author, and being the sole and exclusive proprietors and holders of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-36, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orators pray may be taken as a part of this their bill.

Your orators further say that on or about the twenty-second day of October, 1903, at the City of New York, within the United states aforesaid, and before the publication of said book, your orators deposited in the mail, addressed to the Librarian of Congress at Washington, in the District of Columbia, two copies of the said book, "Sanctuary," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-36, which paper your orators pray may be taken as a part of this bill. Said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orators gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1903, by Charles Scribner's Sons," complying with all the provisions of the
said acts of Congress necessary to secure the benefit of copy-
46 right to your orators; and your orators show that in and by the aforesaid deposit they had intended to obtain, hold and possess and did thereby obtain, hold and possess, and now hold and possess, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book; that the book was published by your orators as "fiction," under the said regulations of the American Publishers' Association, at the net price of one dollar and fifty cents.

IX. That except sales made by your orators at retail for net prices all sales of the said copyright books, to wit: "In the Grip of the Mullah," "Vacation Days in Greece," "The Vagabond," "Gordon Keith," "The Little Shepherd of Kingdom Come," "Colonel Carter's Christmas," "Our Feathered Game," "The Meaning of Pictures,"

"The Better Sort," "The Turquoise Cup and the Desert," "Horses Nine," "The Principles of Money," "The House on the Hudson," "No Hero," "Our Northern Shrubs," "Middle Aged Love Stories," "Trees, Shrubs and Vines," "The Modern Obstacle," "Letters of a Diplomat's Wife," "The Under Dog," "A Doctor of Philosophy," "In the War with Mexico," "Foes of the Red Cockade," "Poems," "In African Forest and Jungle," "The Blood Lilies," "The Weaker Sex," "Reminiscences of the Civil War," "With the Allies to Pekin," "Through Three Campaigns," "My Wonderful Visit," "Old London Silver," "Odd Craft," "The Development of the Drama," "The Daughter of a Magnate," "Sanctuary," have been restricted sales made as aforesaid subject to the said regulations of the American Publishers' Association and to such booksellers only who would maintain the retail net prices as provided by the said regulations and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such retail price, or whose name should be given to them by the Association as one who cuts such net prices; and your orators have at all times refused to sell to any one any of the above enumerated copyright books without restriction except such as your orators have sold, at retail at "net" prices as above set forth. All
47 others of the above enumerated copyright books which have been sold by your orators have been sold by them on the conditions and subject to the restrictions and upon the agreement as to sale at retail prices hereinbefore set forth, and not otherwise, and every purchaser of such books from your orators (except purchasers at retail at net prices) had at the time of purchase from your orators and has since had full and complete notice of the conditions upon which the said books were so sold; and has accepted the same under the said conditions and has always been bound to fulfill the terms thereof. That by virtue of the conditional sales of the said books published under the copyrights above enumerated as above set forth, your orators became and still are entitled to the full performance of the said conditions by all jobbers and dealers to whom such conditional sales had been made under the protection of the said copyrights, and that your orators are as against all men vested by the said copyrights, and by virtue of the said conditional sales with the right to the quiet fulfillment and performances of the said condition and of the said agreement made and entered into on the part of the jobbers and dealers to whom the said books were transferred by such conditional sales, and also to immunity against interference from any one with respect to the said condition, and that none of the aforesaid jobbers and dealers can lawfully sell the said books so conditionally transferred to them except by complying with the conditions of such transfer.

X. That nevertheless the defendants, well knowing the premises and well knowing the rules and regulations of the American Publishers' Association and well knowing that your orators have at all times refused to sell any of the books published under the copyrights hereinbefore enumerated, except either at retail for the full list prices thereof or else not unconditionally but only upon the con-

ditions and with the restrictions hereinbefore mentioned as to resale and on condition that prices be maintained as provided by the regulations of the American Publishers' Association and well knowing the several net prices fixed by your orators for the sale at retail of the books published by your orators under the above enumerated copy-
rights, but designating and contriving to benefit themselves
48 at the expense and to the injury of your orators, have as your orators are informed and believe in the Borough of Manhattan, City of New York, published and sold and exposed for sale copies of the books published under the protection of the said copyright without your orators' consent or permission and in violation of your orators' sole right and liberty secured under the Copyright Act as aforesaid and have sold and offered for sale at retail such books for less than the net prices fixed by your orators for the sale thereof pursuant to the regulations of the American Publishers' Association, and also that the defendants, with full knowledge of the premises as aforesaid, in disregard of the sole right of your orators under the Copyright Act, designing and contriving to benefit themselves at the expense of and to the injury of your orators have as your orators are informed and believe, in the Borough of Manhattan and elsewhere in the United States, induced and persuaded sundry of the jobbers and dealers who have obtained from your orators as aforesaid, books published under the above enumerated copyrights, to deliver the same books to the defendants for sale at retail at less than the net retail prices fixed by your orators for such books respectively, in violation of the agreement, conditions and restrictions upon which as aforesaid the said jobbers and dealers have obtained such books and hold the same as aforesaid; and the defendants have thus induced such jobbers, booksellers and dealers to break and violate the agreement and condition as to maintaining prices and selling to no one known to cut net prices, so as aforesaid made and assumed by them.

By reason of such malicious acts and interference by the defendants your orators have been and are irreparably injured in their lawful trade and business and hitherto have been without sufficient and adequate redress for the wrongs and injuries which they have sustained and now suffer at the hands of the said defendants.

The defendants persist and threaten to continue in their unlawful practices, rendering your orators subject to the danger of irreparable damage to come.

XI. That the defendants by inducing certain jobbers and dealers to break their contracts with your orators induce others to
49 suppose that the said contracts are not valid and by selling your orators' copyright books against the will of your orators, and at less than the prices at which they are sold by other retail dealers, bring confusion into the trade and undersell the booksellers, who lawfully sell the said books, and thereby injure your orators' said trade and business. The number of books published under the copyrights above enumerated amounts to many thousands, and even if it were well known to your orators (as it is not) what jobbers and dealers have violated the conditions of purchase and sale, to obtain

redress from all delinquent jobbers and dealers would involve a multiplicity of suits in many jurisdictions, in each of which the damage obtained would be less than the expense of bringing and maintaining the suit. Wherefore your orators are remediless by way of damages and unless these defendants, who corrupt the jobbers and dealers aforesaid, and cause them to break their agreements with your orators, can be enjoined and restrained from their acts and practices aforesaid for which no adequate compensation can be given at common law or, by damages.

All which acts and doings of the defendants are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators in the premises.

In consideration whereof, and inasmuch as your orators can only have relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, and to the end that said defendants may, if they can, show why your orators may not have the relief hereby prayed for, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best of their knowledge, information and belief, full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and that the defendants may be decreed to account for and pay over the income and profits by their aforesaid unlawful acts derived in violation of your orators' right, and be restrained from any further violation of the said right, your orators pray that your Honors may grant a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and re-
50 straining said defendants, their clerks, attorneys, agents, servants, or workmen, from any further publication, sale, circulation, or distribution in any manner of the said books hereinbefore mentioned, to wit: "Vacation Days in Greece," "In the Grip of the Mullah," "Colonel Carter's Christmas," "The Little Shepherd of Kingdom Come," "Gordon Keith," "The Vagabond," "Our Feathered Game," "The Meaning of Pictures," "The Better Sort," "The Turquoise Cup and the Desert," "Horses Nine," "The Principles of Money," "The House on the Hudson," "No Hero," "Our Northern Shrubs," "Middle Aged Love Stories," "Trees, Shrubs and Vines," "The Modern Obstacle," "Letters of a Diplomat's Wife," "The Under Dog," "A Doctor of Philosophy," "In the War with Mexico," "Foes of the Red Cockade," "Poems," "In African Forest and Jungle," "The Blood Lilies," "The Weaker Sex," "Reminiscences of the Civil War," "With the Allies to Pekin," "Through Three Campaigns," "My Wonderful Visit," "Old London Silver," "Odd Craft," "The Development of the Drama," "The Daughter of a Magnate," "Sanctuary," and that they, and each of them, be enjoined and restrained from obtaining the said books, or either of them, from the jobbers and book-sellers to whom they have been transferred by your orators, by conditional sale, in violation of such condition; and that your Honors, upon the rendering of the decree above prayed for, may assess, or cause to be assessed, in addition to the profits to be accounted

for by the defendants as aforesaid, the damages which your orators have sustained by reason of such infringement of their rights.

And your orators further pray that a provisional and preliminary injunction may issue, restraining said defendants from any further infringement of the rights of your orators as aforesaid, and forbidding the acts which your orators have hereinbefore prayed your Honors to enjoin, and for such other and further relief as the equity of the case may require and to your Honors may seem meet.

May it please your Honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to
51 said defendants Isidor Straus and Nathan Straus, commanding them, on a day certain, to appear and answer under this bill of complaint, and abide by such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

STEPHEN H. OLIN,
Solicitor for Complainants, 32 Nassau Street, Borough of Manhattan, N. Y. City.

STATE AND COUNTY OF NEW YORK, *ss:*

Charles Scribner, being duly sworn, says he is one of the complainants in the above bill, that he has read the same, and is acquainted with the facts therein stated, that said bill and the matters therein stated are true to the knowledge of deponent, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

CHARLES SCRIBNER.

Sworn to before me this 9th day of November, 1903.

HORACE D. BYRNES,
[SEAL.] *Notary Public, N. Y. Co.*

VIII—1

A2

EXHIBITS VIII-1 TO VIII-36 INCLUSIVE.

(Here follow Exhibits XIII-1 to VIII-36 inclusive, consisting of complete records and proof of the copyrighting of each of the books named in the bill of complaint.)

52 The American Publishers' Association, 156 Fifth Avenue, New York.

Plan as Amended to March 4th, 1903.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901; amendments referring to fiction, juveniles and other matters were adopted at later meetings.

SPECIAL ATTENTION is called to changes in the following Sections, 1, 3 (*last paragraph*), 4, 5, *and* 12:

I. That the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore. Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new editions, any work of fiction (not juveniles) or any juvenile of the class that may be described as board books, flat picture books or toy books.

II. It is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III. That the Members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided.

53 A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

It is further agreed by the Members of the Association that they will not themselves offer, nor sell their books to anyone who offers, Protected books in combination with a periodical at less than the trade subscription price of such periodical plus the NET or Minimum Retail price of the book.

IV. That the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile board books, flat picture books, or toy books (not net), published after March 1st, 1903, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

V. The only exceptions to the foregoing rules shall be in the case of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction, and juvenile board books, flat picture books or toy books (not net).

Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription.

Book Clubs are not to be entitled to discount on net books nor to any special discount on fiction.

VI. That the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers
54 shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so re-sold to him on demand.

VIII. That when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

IX. That for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board, the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

X. That it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

XI. That the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the count-y. That the Association pledge itself to support such local associations by every means in its power of maintaining such lawful rules and regulations as may in this way be agreed to.

XII. That in making sales and contracts of sales of their
55 books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

Dated March, 1903.

U. S. Circuit Court filed Nov. 10, 1903, Southern District, New York.

JOHN A. SHIELDS, *Clerk.*

Replication.

Circuit Court of the United States, Southern District of New York.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Individually and as Co-partners, &c., Complainants,
against
ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners, &c., Defendants.

These repliants, Charles Scribner and Arthur H. Scribner, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendants, Isidor Straus and Nathan Straus, for replication thereunto say that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendants and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied to by these complainants; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true.

56 All which matters and things these repliants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

Dated 29th July, 1904.

JOHN A. SHIELDS, *Clerk.*
STEPHEN H. OLIN,
Solicitor for Complainants, 32 Nassau Street, Borough of Manhattan, New York City.

Endorsed: U. S. Circuit Court filed Jul. 29, 1904, Southern District, New York.

57 *Testimony.*

In the Circuit Court of the United States, Southern District of New York. In Equity.

CHARLES SCRIBNER and Another, Complainants,
vs.
ISIDOR STRAUS and Another, Defendants.

Proofs on behalf of the complainants, taken pursuant to notice, under the 67th Rule in Equity as amended, before John A. Shields, Esq., Standing Examiner, at the office of the complainants' solicitor, No. 32 Liberty street, Borough of Manhattan, City of New York, on Wednesday, August 24th, 1902, at 11 A. M.

Appearances.

Stephen H. Olin, Esq., of counsel for the complainants.
Edmund E. Wise, Esq., of counsel for the defendants.

E. LILIAN KINNEAR, a witness called on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name, residence and occupation, Miss Kinnear?

A. E. Lilian Kinnear, 351 West 15th street; buyer for several departments for R. H. Macy & Company.

Q. 2. How long have you been in the employ of the defendants, R. H. Macy & Company?

A. About 22 years, in the 23rd.

Q. 3. And for the last seven years you have been at the head of the book department, and as such have made all purchasers of books and supervised the sale thereof at retail, have you not?

A. Over eight years, I think, now; it is nearer nine.

58 Q. 4. Upwards of eight years?

A. Yes, sir.

Q. 5. It has been your duty, has it not, to familiarize yourself, not only with the purchases of books from the publishers and large jobbers, but with the retailer's methods of disposing of books over the counter to the public at large?

A. What do you mean by that, Mr. Olin? You mean that I familiarize myself with the prices?

Q. 6. And the methods of disposal of books, and the methods of conducting the trade both by publishers and retailers and jobbers?

A. Yes, sir.

Q. 7. Books are furnished to the public by retailers, are they not, for the most part?

A. Yes. Retailers and jobbers sell them to the public; publishers sell them to the public.

Q. 8. And wholesale book dealers and jobbers, such as the American News Company, the Baker-Taylor Company, and other similar concerns, do not sell at retail, but distribute the books among the small retailers, or outside of the city, where the publisher conducts his business; that is a fact, is it not?

A. I think that they would sell at retail also; in fact, I am quite sure that jobbers would, if necessity demanded, or they had a call for it.

Q. 9. As a general rule?

A. As a general rule, Oh, yes.

Q. 10. The defendants in this action, the firm of R. H. Macy & Company, are large retailers, are they not, of books?

A. Yes, sir.

Q. 11. As well as other merchandise?

A. Yes, sir.

Q. 12. Do you remember in the year 1900, there was a disorganization in the book trade, and an attempt was made to re-organize and establish new rules in regard to it?

A. There has been no disorganization, as far as I am concerned, Mr. Olin. When I say I, I mean R. H. Macy & Company.

Q. 13. What did you mean, then, when in your affidavit, sworn December 3rd, 1902, in the suit of Isidor Straus and another
59 against the American Publishers' Association, in the New York Supreme Court, you said, "During the year 1900 the retail book trade became very much disorganized by reason of the foregoing facts?"

A. I don't understand your question.

Q. 14. That was true, what you said in that affidavit?

A. Entirely true.

Q. 15. And do you remember in October, 1900, a circular was issued to the trade, of which a copy was sent to the firm of R. H. Macy & Co., and did you produce in that suit a copy of that circular and annex it to your affidavit?

A. (Witness examines affidavit.) Yes, sir.

Q. 16. Is the paper I now show you, from folios 83 to 92 of the printed papers on appeal from order dated May 25th, 1904, in the case of Straus against the American Publishers' Association, in the New York Supreme Court, a copy of that circular?

A. Yes, sir.

Mr. OLIN: I offer that in evidence.

Mr. WISE: Objected to as entirely irrelevant, immaterial and incompetent.

The paper referred to is marked "Complainants' Exhibit 1, of August 24th, 1904, J. A. S., Ex'r."

Q. 17. Subsequently, Miss Kinnear, you received another circular, embodying resolutions of the American Publishers' Association, which you also produced and annexed to your affidavit in the action mentioned in the Supreme Court, and a copy of which is found from folios 93 to 100, inclusive, in the same record?

A. I can't remember if I received it.

Q. 18. You saw it about the time of its issue, did you not?

A. I saw it about the time of its issue, but I can't remember whether I received it.

Q. 19. You subsequently annexed it to that affidavit?

A. Yes, sir.

Mr. OLIN: I offer that in evidence.

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

60 The paper referred to is marked "Complainants' Exhibit 2, of August 24th, 1904, J. A. S., Ex'r."

Q. 20. You were informed that after the issue of the resolutions, dated February 13th, 1901, new resolutions relating to works of fiction were adopted by the American Publishers' Association, were you not?

A. Yes.

Q. 21. I show you the copy circular annexed to the bill of complaint in this action, being plan of American Publishers' Association, as amended to March 4th, 1903, and ask you if you saw that circular?

A. I did.

Q. 22. The firm of R. H. Macy & Company had refused to enter the American Publishers' Association or to abide by any of its rules, had it not?

A. They had.

Q. 23. Prior to May 1, 1901, Funk & Wagnalls Company, a member of the American Publishers' Association, had advertised for publication, a work of fiction called "Tarry Thou Till I Come;" it was advertised under the rules of the association as a net book, to be sold by all dealers at retail at $1.40; that is true, is it not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

A. Yes.

Q. 24. You had purchased for R. H. Macy & Co., large quantities of books, and sold the same at $1.24, had you not?

Mr. WISE: Same objection.

A. Yes.

Q. 25. Mr. Emory, the manager of the American Publishers' Association, sought to persuade you to maintain the price called the net price, of $1.40, which with the sanction of R. H. Macy & Company, after consultation, you refused to do?

Mr. WISE: Same objection.

A. Yes.

Q. 26. Thereafter the American Publishers' Association
61 issued a circular, requesting all publishers and wholesale booksellers, and also retail book dealers, to refuse any dealing of any kind with R. H. Macy & Company?

Mr. WISE: I object to that as asking for hearsay on the part of the witness, and as being incompetent, irrelevant and immaterial.

A. They did.

Q. 27. And you so stated in an affidavit?

A. Yes, sir.

Q. 28. Now, after that the firms which were members of the American Publishers' Association refused to sell you their copyright books, did they not, for R. H. Macy & Co., except at retail?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer the question.

Q. 29. After that circumstance which you last mention, did the Charles Scribner's Sons decline to sell their copyright books to the firm of R. H. Macy & Company?

A. They did.

Q. 30. And that refusal has continued up to the present time?

A. It has.

Q. 31. I show you a list of books contained in paragraph 9 of the bill of complaint herein, and ask you whether those books have been sold by the firm of R. H. Macy & Company?

A. To the best of my knowledge the majority of them have.

Q. 32. You are aware, are you not, that the firm of Charles Scribners' Sons issued its books under the rules of the American Publishers' Association?

A. I know that they are members of the American Publishers' Association.

Q. 33. And one member of the firm, Mr. Charles Scribner, has been an officer of the association, has he not?

A. So I believe.

Q. 34. And active in enforcing its rules?

A. So I believe.

Q. 35. Such of those books as have been sold by you have
62 been sold at lower prices than the prices fixed by the rules of the American Publishers' Association, have they not?

A. They have.

Q. 36. Can you say what discount from the published retail price of works of fiction the firm of R. H. Macy & Company sold those books at?

A. Varied discounts.

Q. 37. But greater, in all cases, than 28 per cent., was it not?

A. In every case. One moment. Not on the net books. You asked me fiction?

Q. 38. I mean to apply the question only to fiction. Now, in regard to what are known as net books in the trade, such of those books as are net books were sold by R. H. Macy & Co., when sold at all, at less than the net price?

A. They were.

Q. 39. Will you look again at the list of books set forth in paragraph 9 of the bill of complaint herein, and say where R. H. Macy & Company obtained the books which they sold as you have stated?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer that question.

Q. 40. Did you obtain any of the books that were so sold by you,

and are mentioned, in paragraph 9 of the bill of complaint, from the firm of Charles Scribner's Sons directly?

A. We may have; I couldn't remember at this time; we may have purchased them.

Q. 41. Did you make any purchases during that period?

A. We may have at retail.

Q. 42. At retail. Can you tell how extensive those purchases were?

A. I couldn't.

Q. 43. Do you keep a record of your purchases?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

A. Of the names of the books purchased?

Q. 44. I ask you generally of books purchased?

A. Yes.

63 Q. 45. What is that record kept in, what book?

A. I don't believe I quite understand you, Mr. Olin; I must have you ask that question again.

Q. 46. Is there kept in the book department of R. H. Macy & Co., a record of purchases of books which are sold in that department?

A. Yes.

Q. 47. Under whose direction is that kept?

A. The head bookkeeper's.

Q. 48. Do you have any superintendence of it, or control of it?

A. I purchase all books direct.

Q. 49. And do you give the head bookkeeper the information from which he makes his entries?

A. He receives all my bills.

Q. 50. And does he enter the purchases from those bills?

A. As purchases from E. L. Kinnear.

Q. 51. So that all the books sold by R. H. Macy & Co. appear to have been purchased from E. L. Kinnear?

A. Are purchased from E. L. Kinnear.

Q. 52. Now, do you keep a record of persons from whom you purchase those books which you furnish R. H. Macy & Co.?

A. No, sir.

Q. 53. Do you keep the bills which you pay to different persons?

A. I make a cash purchase in every case.

Q. 54. Do you take a receipt?

A. Rarely.

Q. 55. When you said that the bills which you had paid were furnished to the head bookkeeper, what did you mean?

A. That E. L. Kinnear's bills are furnished to the head bookkeeper.

Q. 56. And the bills which you receive, what is done with those?

A. I have no further use for them.

Q. 57. What is done with them?

A. Destroyed.

Q. 58. Do you destroy them?

A. I destroy them.

Q. 59. How soon do you destroy them after paying them?

64 Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 60. How long has this system of bookkeeping been carried on in your business?

A. Some time in the year 1901.

Q. 61. Prior to that time, the books of R. H. Macy & Co. showed that the purchases were made from the different dealers from whom the books came, did they not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and I request the witness not to answer.

Q. 62. Will you now look again at the copy of the bill of complaint in this action, which I handed you, at paragraph 9 thereof, and say where, according to your best recollection, you obtained the supplies of the book called, "In the Grip of the Mullah," which have been sold by you?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and I request the witness not to answer.

Q. 63. I now ask you a like question as to each of the books mentioned in that paragraph of the bill of complaint?

Mr. WISE: Same objection and request.

Q. 64. Since the existence of the American Publishers' Association, you have been compelled to purchase books through secret ways, have you not?

A. Entirely.

Q. 65. And it is for that reason that you are unwilling to disclose the methods and means by which you secure the supply of books for the store?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent and direct the witness not to answer.

Q. 66. Did you not so depose in an affidavit furnished by you to the Messrs. Straus, and produced in the said action brought by them against American Publishers' Association, in the Supreme Court of the State of New York, at folio 120 of the printed book already alluded to?

Mr. WISE: Objected to as irrelevant, immaterial and in-
65 competent, and as not being in the line of direct-examination of the witness, and as seeking to impeach the complainants' own witness.

A. I said that I was compelled, and am compelled, to purchase books through secret ways, and I am unwilling to tell you from whom I purchase them.

Q. 67. Can you say positively, Miss Kinnear, that any of these books mentioned in paragraph 9 of the bill of complaint, were purchased by you, or by your direction, at retail at the complainants' store?

A. I can't say positively that they were.
Q. 68. Can you say that they were purchased anywhere?
A. At retail?
Q. 69. At retail.
A. Most assuredly they were.
Q. 70. How many of them?
A. I couldn't tell you.
Q. 71. Were a tenth part of them purchased at retail?
A. I couldn't tell you at this late date, Mr. Olin.
Q. 72. When making affidavits in the suit mentioned, in the Supreme Court, brought by the Messrs. Straus against the American Publishers' Association, you swore that the book department was conducted for the purpose of making profit, did you not?
A. I did.
Q. 73. And that the practice of selling goods at less than they cost, was confined to the magazines and didn't extend to the books, did you not?
A. Under ordinary circumstances.
Q. 74. Was that true?
A. Absolutely.
Q. 75. Was it true about these books mentioned in paragraph 9 of the bill of complaint.
A. No.
Q. 76. Were those sold by you at a loss?
A. They were.
Q. 77. All of them?
A. All purchased at retail.
Q. 78. What proportion of them was sold at a loss?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

66 Q. 79. Can you say as to your general dealings in copyrighted books at the present time, what proportion of them is obtained at retail?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and I request the witness not to answer.

Q. 80. The purchase at retail is not the only source from which you obtained the books mentioned in paragraph 9 of the bill of complaint, is it?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 81. Did you obtain any of those books from jobbers?

Mr. WISE: Same objection and same request.

Q. 82. Did you get any of these books mentioned in paragraph 9 of the complaint from out of town?

Mr. WISE: Same objection and request.

Q. 83. You understand that with reference to these books mentioned in paragraph 9 of the complaint, every bookseller must,

before he can purchase any books, whether for sale in his own state or for trans-shipment to another state, sign a pledge to the American Publishers' Association to the effect that for a specified time he will sell all books subject to the rules of said American Publishers' Association; do you not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and on the further ground that it is not within the absolute knowledge of the witness and necessarily must be on information and belief.

A. I believe that all are asked to sign the agreement.

Q. 84. And you understand each one must before the books are purchased, whether for sale in his own state or for trans-shipment to another state, sign such a pledge?

Mr. WISE: I object to that upon the same grounds.

A. I understand they are asked to sign it.

Q. 85. And they must sign it before obtaining the books, don't you understand?

67 A. I understand that they are asked to sign it.

Q. 86. Well, have you not sworn in this suit that they must sign it to obtain books?

A. Yes, sir.

Q. 87. And that was true, was it not?

A. As far as I know.

Q. 88. The firm of R. H. Macy & Company undertook to prevent the carrying out of this rule of the American Publishers' Association, did they not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

A. R. H. Macy & Co. refused to become one of the members or to sign any agreement whatever.

Q. 89. And they also brought a suit in the Supreme Court of the State of New York, intended against the American Publishers' Association and some of its members and others, asking for an injunction to prevent the enforcement of these rules, did they not?

A. They did.

Q. 90. You read the complaint in that action, did you not?

A. I did.

Q. 91. And made various affidavits in the course of that litigation.

A. I did.

Q. 92. And were acquainted with its progress from time to time?

A. Yes.

Q. 93. Prior to December 11th, 1902, the book department had been conducted for the purpose of making a profit, and had made a profit entirely satisfactory in amount to any dealer, in your opinion, had it not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent to this action.

A. It had.

Q. 94. And you made affidavit to the effect, that in order to meet competition of other dealers, or to diminish an over-large or unsaleable stock you had occasionally offered books for sale at cost
68 price and sometimes even less, but this had been done only in those emergencies where a similar policy would have been adopted by any of your competitors in order to meet competition or diminish the stock; is that true?

adopted by any of your competitors in order to meet competition or diminish the stock; is that true?

Mr. WISE: I object to that as incompetent, irrelevant and immaterial, and in so far as the question relates to the present time I request the witness not to answer.

Q. 95. I asked you to state whether that is still true of the book department?

Mr. WISE: Same objection and request not to answer.

Q. 96. I ask you to say whether that is true of your sales of those books set forth in paragraph 9 of the complaint?

Mr. WISE: Same objection and request not to answer.

Q. 97. Did you state in the affidavit last referred to, sworn 11th December, 1902, that the books which you had succeeded in buying were bought from people who knew the price for which deponent bought them, who knew deponent and the position which she occupied, and who were willing to take the risk of incurring the displeasure of the combined publishers and combined booksellers for the profits that she offered them. Did you swear to that?

A. I did.

Q. 98. Was that true?

A. Absolutely.

Q. 99. Is that true as to the books mentioned in paragraph 9 of the complaint?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 100. Did you testify in the same affidavit that in some instances some booksellers have offered their services to deponent in order to secure the profits they might derive from sales to her, and to show their hostility to any attempt to control the whole trade?

A. I did.

Q. 101. Is that true as to the books mentioned in paragraph 9 of the complaint?

Mr. WISE: Same objection and request to the witness not to answer.

69 —. 102. Miss Kinnear, Macy & Co. advertise freely in the daily press, do they not?

A. They do.

Q. 203. (Handing witness paper.) I show you the "Sun" of Tuesday, April 19th, 1904, at page 12, and ask you whether that contains one of the advertisements of the defendants, R. H. Macy & Co.?

Mr. WISE: I object to that as irrelevant, immaterial and incom-

petent, it being a publication nearly a year and a quarter after the beginning of this action, and not being within the issues.

Mr. OLIN: I offer in evidence so much of the advertisement as related to books.

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and as much later than the issue in this action, and as having nothing to do with the issues in the action.

The paper referred to is marked "Complainants' Exhibit 3, of August 24th, 1904, J. A. S., Ex'r."

Mr. OLIN: I offer in evidence the advertisement from the "Sun" of December 6th, 1902, of which a copy is contained in the said papers on appeal, folios 206 to 212.

Mr. WISE: Same objection.

The advertisement referred to is marked "Complainants' Exhibit 4, of August 24th, 1904, J. A. S., Ex'r."

Mr. WISE: We admit that that appeared, and that the man in charge of the advertising of Macy & Co. put it in, but do not admit the truth.

Mr. OLIN: I also offer in evidence the advertisement from the "Times," of March 14th, 1902, found in said printed papers, folios 213 to 219.

Mr. WISE: Same objection as to that, also that all these advertisements were prior to the issue of the copyright on the books in this action.

The advertisement referred to is marked "Complainants' Exhibit 5, of August 24th, 1904, J. A. S., Ex'r."

Q. 104. I understand that in pursuance to the request of the defendants' counsel, you decline to tell me the source from
70 which you obtained any of the books mentioned in paragraph 9 of the complaint; is that true?

A. Absolutely.

Q. 105. I understand that you are able to tell me the source from which you obtained at least some of those books?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 106. I understand that there is no record kept by R. H. Macy & Co. of the source from which those books have come, and that all of them seem to have been sold to R. H. Macy & Co. by you.

A. All books published by members of the American Publishers' Association are sold to R. H. Macy & Co. by myself.

Q. 107. And there is no book or record in possession of R. H. Macy & Co. which will show from whom you obtained those books?

A. None whatever.

Q. 108. Is that true of other books than those affected by the rules of the association?

A. Yes.

Q. 109. Do you sell to R. H. Macy & Co. other books than those published by members of the American Publishers' Association?

A. I have just stated that all books published by the association are sold by me to R. H. Macy & Co.

Q. 110. How about other books not published by the American Publishers' Association?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent.

I will state upon the record, if you so wish, if that is what you are seeking, that R. H. Macy & Co. have no record from whom any of those books have been purchased, or the price at which they have been purchased.

Mr. OLIN: I am asking about other books.

Mr. WISE: As to other books, I object, as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 111. You decline to answer, then, whether this rule of purchasing books, published by members of the American Pub-
71 lishers' Association, from you, extends to other books not published by members of the American Publishers' Association?

A. I decline to answer.

Q. 112. And you decline to answer whether there is a record in the books of R. H. Macy & Co., showing the source from which they obtain books not published by members of the American Publishers' Association?

A. By the advice of my counsel, yes.

Q. 113. You decline to say what proportion of these books mentioned in paragraph 9 of the complaint were obtained from jobbers in the trade?

A. Yes, by the advice of my counsel.

Q. 114. You decline to say what proportion of them were obtained at retail?

A. Yes.

Q. 115. Will you tell me what proportion of the books sold by you consist of books published by members of the American Publishers' Association?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 116. I explain to you that the object of the question is to ascertain how this business can be profitable, as you say it is, if a large part of the merchandise is sold at a loss, and I therefore ask it in explanation of statements made by you already?

Mr. WISE: I object to that, on the ground that it is irrelevant, immaterial and incompetent, that the statement so made was made in an affidavit of December 11th, 1902, and not as of the present time, and request the witness not to answer.

Q. 117. Miss Kinnear, I shall read from a paper annexed to your affidavit of 12th May, 1904, a list of names which I understand you state were black-listed for supplying R. H. Macy & Co.: Wm. Jackson, New York; Colonial Book Store, Boston, Mass.; New Bedford Dry Goods Co., New Bedford, Mass.; E. E. Baldwick, New York; N. Snellenberg & Co., Philadelphia, Pa.; Sherwood & Son, Meriden,

Conn.; I. & M. Ottenheimer, Baltimore, Md.; Hunter &
72 Hunter, Detroit, Mich.; Owen Mines, 383 Fourth avenue, New York; is that a fact? That is, do you understand that those people were cut off for supplying R. H. Macy & Company?

A. I do.

E. LILLIAN KINNEAR.

Sworn and subscribed to before me this 15th day of October, 1904.

JOHN A. SHIELDS,
Examiner.

Adjourned without date.

NEW YORK, *August* 25, 1904.

Met pursuant to adjournment.
Present: Counsel as before.

GEORGE S. EMORY, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name and occupation?

A. George S. Emory; vice-president of D. Appleton & Company.

Q. 2. Were you formerly connected with the American Publishers' Association?

A. Yes.

Q. 3. In what capacity?

A. Manager.

Q. 4. And for what period?

A. From March 1, 1901, to January 1, 1903.

Q. 5. What were your functions in a general way?

A. To carry out the plan of the association for the maintenance of net prices.

Q. 6. Did you have general knowledge of the affairs of the association and its transactions of every kind?

A. Yes.

Q. 7. During the time of your connection with the association was there any correspondence of any kind on the part of the association looking to fixed prices which the members of the association should charge for books published by them?

73 A. With the members of the association?

Q. 8. Yes.

Objected to as irrelevant, incompetent and immaterial.

Q. 9. Was there any action on the part of the association or any dealings on its behalf looking toward limiting the supply of books in any way to the public?

A. No.

Q. 10. Were steps taken to bring to the attention of the trade at large the regulations adopted by the association with regard to fixing prices?

A. Yes.

Objected to as irrelevant, incompetent and immaterial.

Q. 11. I show you a paper and ask if you know what it is (hands witness paper)?

A. Yes, I do.

Q. 12. Were papers like that sent to anyone, and if so, to whom?

Objected to as irrelevant, incompetent and immaterial.

A. They were sent to the entire book trade of the United States according to lists which we had.

Mr. OLIN: I offer that in evidence.

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

The paper referred to was marked "Complainant's Exhibit No. 6, August 25, 1904."

Q. 13. That letter refers to an enclosure. Can you produce the enclosure that was sent with it?

A. That is the enclosure.

Mr. OLIN: I offer it.

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

The paper referred to was marked "Complainant's Exhibit No. 7, August 25, 1904."

Q. 14. Can you tell by the date when those two exhibits, 6 and 7, were sent to the trade generally?

74 Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

Mr. OLIN: When I say date I mean the periods.

A. Yes, sir; they were sent in March, 1901.

Mr. WISE: I object to the circular and the enclosure on the ground that they long antedate the action and copyright of the books set forth in the complaint.

Q. 15. When amendments were made to the rules of the association relating to fiction, was notice given to the trade?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial unless it is proven that it was sent to the defendants.

Q. 16. I show you a paper and ask you whether that circular was sent out, and, if so, to whom?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial, unless he specifies that it was sent to the defendant.

A. This was sent to the booksellers of the country, according to our list.

Q. 17. What was that list, was it a complete list so far as you know?

A. So far as I know, it was.

Q. 18. Was an effort made to make it complete?

A. Yes.

Q. 19. How was it compiled?

A. It was obtained from one of the members of the association,

one of the publishing houses, which was a member of the association who used that list to circularize the trade as to the books.

Q. 20. Can you state in a general way how many names were on it; that is to say, hundreds or thousands?

A. I think in the neighborhood of 1,500.

Mr. OLIN: I offer the paper in evidence.

The WITNESS: There may have been more than that, but I am quite sure there were as many as 1,500.

75 Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

The paper referred to was marked "Complainant's Exhibit No. 8, August 25th, 1904."

Q. 21. Was a notice ever issued by the association relating to the firm of R. H. Macy & Company, and stating whether or not they were under-sellers?

A. Yes, there was.

Q. 22. Can you tell about when?

A. About the middle of May, 1901.

Q. 23. Have you a copy of that paper?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. I haven't it with me, but I think a copy is probably on file in the office of the association.

Mr. OLIN: I offer a copy of that notice in evidence, and when produced, it will be marked Exhibit No. 9.

Mr. WISE: I suppose that was a regular circular letter?

The WITNESS: I think not; I think it was a written letter, written on a typewriter. The particular letter notifying members and jobbers not to supply Macy & Company, that was not a printed letter, that was a letter written on a typewriter.

Q. 24. About when was that sent out?

A. About the middle of May, 1901.

Q. 25. Are you able to say whether it was a matter of general knowledge in the trade that Macy & Company were not keeping the prices as fixed by the rules of the association?

A. It was.

Cross-examination by Mr. WISE:

X Q. 26. Did you take part in the organization of the American Publishers' Association?

A. No.

X Q. 27. When did you first enter their employ?

A. On March 1, 1901.

76 X Q. 28. That was after the adoption of the resolution which has been introduced in evidence?

A. Yes.

X Q. 29. Your connection with the American Publishers' Association terminated on the 1st of January, 1903?

A. Yes.

X Q. 30. You have no knowledge then, no personal knowledge,

of any acts that transpired since that time, as far as the American Publishers' Association is concerned?

A. No.

X Q. 31. When you issued the circular cutting off Macy's book supplies, was that ever rescinded by you?

A. No.

X Q. 32. It remained in force?

A. Yes.

X Q. 33. And as far as you know it was obeyed by all the members of the Association?

A. Yes.

X Q. 34. Can you tell me how many members of the American Publishers' Association there are?

A. I cannot tell you now, no. There have been members, probably, taken in and dropped since I was associated with the association.

X Q. 35. At the time that notice was sent out I speak of?

A. In the neighborhood of twenty, I should say.

X Q. 36. How many are there now, do you know?

A. How many of those twenty?

X Q. 37. No, how many members are in the American Publishers' Association now?

A. I couldn't say exactly, I would estimate it in the neighborhood of 50, perhaps more or perhaps less.

X Q. 38. Is the majority of the publishing trade in that association at the present time?

A. Yes.

X Q. 39. Have you any knowledge of the American Booksellers' Association?

A. Yes.

X Q. 40. When was that organized?

A. I couldn't say exactly; it was a little prior to the organization of the Publishers' Association, I think.

77 X Q. 41. Prior to that?

A. I think so.

X Q. 42. Were they in any relation, business or otherwise, with the American Publishers' Association?

A. No.

X Q. 43. None at all?

A. No.

X Q. 44. Were the members of the Booksellers' Association under any agreement with the American Publishers' Association, as an association, I am now speaking of?

A. No, none.

X Q. 45. Were the members of the Booksellers' Association or any others members of the trade required to sign any papers or agreements with the American Publishers' Association as to the maintenance of the rules of the association?

A. In some cases, yes.

X Q. 46. Is it not a matter of fact that they were so required in all cases?

A. No, sir.

X Q. 47. In what cases were they not?

A. Why, a great many cases we didn't require them to sign any agreement, unless they were newcomers in the business. If we knew about them, and they had been observing the prices in conformity with the plan, we did not require them to sign any agreement, but in case of any new dealer, we did sometimes.

X Q. 48. Have you got a copy of that agreement?

A. I have not a copy, but there is one on file in the office of the Association.

X Q. 49. Is that the notice that we speak about (handing witness paper)?

A. That is the notice.

X Q. 50. That was only exacted from those traders who were new in the business?

A. Generally speaking, yes. If we had any doubts about any person, even though he had been in the trade before, we might ask him to sign one of those.

X Q. 51. It was assumed that the others would continue to abide by all the rules exacted by this pledge?

A. Yes.

78 X Q. 52. When there was any question about it, they were requested to sign this?

A. Yes.

X Q. 53. And if they refused, what occurred?

A. If they refused and cut prices, we would discontinue their supplies.

X Q. 54. If they refused and did not cut the prices, what occurred?

A. We did not discontinue.

X Q. 55. Would they continue to get books?

A. Yes.

X Q. 56. If they were asked to sign this notice and refused to sign it, the trade was still allowed to sell them, and would sell them?

A. Yes.

X Q. 57. Are you quite positive of that?

A. Yes.

X Q. 58. This was a mere matter of form, and unless the refusal was followed by the cutting of prices, it had no weight or effect?

A. No.

Mr. WISE: I offer it in evidence.

The paper referred to was marked "Defendant's Exhibit A, August 25, 1904."

X Q. 59. Mr. Emory, how did you receive notice of price cutting—from whom, as the usual rule?

A. From members of the trade.

Mr. OLIN: I object to this as immaterial and irrelevant and I don't understand the purpose of it.

Mr. WISE: I am going to show the procedure of the Publishers' Association, in accordance with the circular, the steps they took to

cut off the supply, how they got their information, and how it was carried into effect.

A. (continued). From the members of the trade and advertisements.

X Q. 60. When you say members of the trade, do you mean members of the publishers' trade or members of the book trade?

A. Members of the book trade.

79 X Q. 61. Usually those members were members of the Booksellers' Association, as the ordinary rule?

A. No, I couldn't say as to that.

X Q. 62. You would not say whether they were or whether they were not?

A. No.

X Q. 63. When you received notice of a price cutter and determined to cut off his supply, what was the method that you employed?

A. After we determined to cut off his supply, we sent out the notice to the members.

X Q. 64. To the members of what?

A. The members of the Publishers' Association, and to the larger book dealers and to the jobbers.

X Q. 65. Did you send any such notice to the American Booksellers' Association?

A. No, sir.

X Q. 66. Were they informed as to the list of names that were cut off by your order?

Mr. OLIN: Objected to as incompetent, irrelevant and immaterial; unless the association was informed by the witness, he cannot know whether they were informed or not.

X Q. 67. You sent no circular to the association?

A. No.

X Q. 68. And no notice to their association?

A. No.

X Q. 69. And no dealer knew from you, except as you have stated, that the supply of any individual had been cut off?

A. No dealer knew from me?

X Q. 70. Yes.

A. You mean a bookseller in some part of the country?

X Q. 71. In the City of New York?

A. Unless we sent him notice to that effect.

X Q. 72. I asked you did you send a notice?

A. In some cases we did, yes.

X Q. 73. As far as R. H. Macy & Company were concerned, did you or did you not send notice throughout the book trade that they were not to be supplied with books?

80 A. The book trade of New York or the book trade of the country?

X Q. 74. The book trade of New York?

A. I don't think that we did.

X Q. 75. Are you sure that you did not?

A. No, I am not.

X Q. 76. Do you know as a matter of fact whether the Booksellers' Association published a list of names of dealers whose supplies had been cut off by the American Publishers' Association?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and as being no part of the issues as at present framed since the striking out of the second defense.

Mr. WISE: I offer the testimony for the purpose of impeaching the witness' testimony.

A. I have seen such a list.

X Q. 77. You know that they have been published regularly?

A. I don't know how regularly, but I have seen them at different times, and I think regularly for a time, yes.

X Q. 78. Is it not a matter of fact, Mr. Emory, that the Book and Newsdealer, issued monthly, contained a report of the secretary of the Booksellers' Association, and that in each case at the end of that report there was a list of dealers under the heading that their supplies had been cut off?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and as calling for the contents of a document having nothing to do with the issues as at present framed, and I advise the witness not to answer the question.

X Q. 79. You have stated, Mr. Emory, that you have occasionally seen that list: Will you state whether that list was intended on behalf of the American Publishers' Association as a notice to the wholesale and retail book trade that the dealers mentioned on that list had not obeyed the rules of the American Publishers' Association?

A. The American Publishers' Association had nothing to do with the preparation of that list.

81 Mr. WISE: I move to strike the answer out as not responsive.

X Q. 80. My question is not whether the American Publishers' Association had anything to do with that, but whether that list was published and intended to be published as a notice from the American Publishers' Association?

Mr. OLIN: I submit that question was answered.

Mr. WISE: I press the question.

A. The American Publishers' Association had nothing to do with it whatever.

X Q. 81. When you say it had nothing to do with it whatever, do you mean the physical fact of publication?

A. Or had anything to do with the publication in any way.

X Q. 82. It had nothing to do with the furnishing of any of the names on it?

A. No, sir.

X Q. 83. Nor with the list?

A. No, sir.

X Q. 84. And had nothing to do with furnishing any to the Booksellers' Association?

A. Not formally, no.

X Q. 85. Did it do so informally?

A. No, not as a rule.

X Q. 86. Did it ever do so?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and because it has nothing to do with the issues as now framed and I advise the witness not to answer.

X Q. 87. You intend to say then that the lists published in the Book and Newsdealer, the organ of the American Booksellers' Association, under the title of "Secretary's Report," was not an official notice in any way connected with the American Publishers' Association?

A. Yes.

X Q. 88. And that it was not issued with their sanction?

A. Yes.

X Q. 89. Nor from information gathered from them?

A. Yes.

82 X Q. 90. When the publishers issued their notice that R. H. Macy & Co. had not complied with the rules and were not to be supplied with books, did they send that notice to any of the dealers outside of the State of New York?

A. Yes.

X Q. 91. They sent it pretty generally throughout the trade?

A. They sent it to the larger dealers and to the jobbers.

X Q. 92. As a consequence thereof, the larger jobbers did not do business with R. H. Macy & Company?

A. I suppose not.

X Q. 93. What steps were taken to ascertain the sources from which the Macys got their books by the American Publishers' Association?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and as being no part of the issues, and I advise the witness not to answer.

X Q. 94. The effect of that circular was intended to be the cutting off of the Macy's book supply, was it not?

A. Yes.

X Q. 95. Do you know the plaintiff in this action?

A. Yes.

X Q. 96. Do you know whether they sell books at wholesale?

A. Yes.

X Q. 97. They do?

A. Yes.

X Q. 98. Do they sell books at retail?

A. Yes.

X Q. 99. Do they sell their own publications only at wholesale?

A. Yes.

X Q. 100. And do they sell their own publications only at retail?

A. No, they keep a regular book store.

X Q. 101. They keep a regular book store in which they sell books of all kinds?

A. Yes.

X Q. 102. And they sell, as far as you know, all books pursuant to the rules of the American Publishers' Association?

A. They do.

83 X Q. 103. Is the same true of a number of other firms that are members of the Publishers' Association?

A. It is true of a few.

X Q. 104. Can you mention one?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. Dodd, Mead & Company; Putnam; Little, Brown & Company, of Boston. Those are all that I think of just at the minute.

X Q. 105. Are any of the members of the American Publishers' Association members of the American Booksellers' Association?

Mr. OLIN: Objected to as immaterial and irrelevant, and there being no foundation for it, and it does not appear that the witness knows, and the witness is advised not to answer.

X Q. 106. Do you know the members of the American Publishers' Association?

A. Yes.

Mr. WISE: I now repeat the question before asked, whether any of the members of the American Publishers' Association are members of the American Booksellers' Association.

Mr. OLIN: I make the same objection, and the witness is advised not to answer.

X Q. 107. The reason why the Macy's were cut off from their supply of books was that they had undersold the publication of "Tarry Thou Till I Come?"

A. I think there were other books at the same time; that was one of them.

X Q. 108. Was not the circular sent out in consequence of "Tarry Thou Till I Come" being undersold at Macy's?

A. Yes, partly. As I say, I think there were other books at the same time undersold.

X Q. 109. Was that not the direct cause of it, after they had refused to keep up the price of "Tarry Thou Till I Come?" Did you not go to see them and ask them to maintain the price?

A. Yes.

84 X Q. 110. And upon their refusal did you not then issue the circular?

A. Yes.

X Q. 111. So that it was directly in consequence of their refusal to maintain the price of "Tarry Thou Till I Come" that they were shut off from their supply of books?

A. As I say, I think there were other books at the same time that

they were cutting, and they had announced their intention of cutting prices before.

X Q. 112. Was it directly in consequence of that book, after their refusal to maintain the price on that particular book, that you sent out the notice?

A. Yes.

X Q. 113. Did the order of the Publishers' Association deprive the defendants, R. H. Macy & Company of the rights to purchase in the open markets books copyrighted or uncopyrighted, or was that its purpose or intention?

Mr. OLIN: Objected to as immaterial and irrelevant and not within the issues, and as incompetent, and the witness is advised not to answer.

X Q. 114. Do you know that an action was brought in the State Courts to declare the combination of the American Publishers' Association and the American Booksellers' Association unlawful?

A. Yes.

X Q. 115. Do you know that the Court of Appeals of this State decided that in part, at least, their combination was unlawful?

Mr. OLIN: Objected to. The opinion of the Court of Appeals should be looked to for the decision.

X Q. 116. You are quite sure, Mr. Emory, that there was no agreement or combination of any kind between the American Booksellers' Association and the American Publishers' Association?

A. I am.

X Q. 117. Are you quite certain that the rules adopted by the American Publishers' Association were not adopted with the knowledge and with the consent of the American Booksellers' Association and after deliberation with them?

A. I don't know about that.

85 X Q. 118. Do you remember having made an affidavit on the 9th day of December, 1902, in the action brought in the New York Supreme Court by Isidore Straus and others against the American Publishers' Association and having attached thereto a circular issued by the American Publishers' Association?

A. I remember making an affidavit and attaching a circular.

X Q. 119. Do you recollect when that circular was issued?

A. No, I do not. I don't recall exactly what the circular was at this time.

X Q. 120. I will show it to you. Does that refresh your recollection?

A. Well, I don't remember the date of that, it was about the time of the formation of the Association.

X Q. 121. About that time?

A. Yes.

X Q. 122. Do you know by whom that was sent out?

A. I think it was sent out by the American Booksellers' Association.

X Q. 123. Do you know whether it was done with the approval of the American Publishers' Association?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. No, not that I know of.

X Q. 124. Do you know whether this statement therein contained was correct or incorrect:

"The reform measures which are to go into operation on the 1st of May, have been adopted by the American Publishers' Association and by the American Booksellers' Association, after careful and thoughtful deliberation, with a view to conserving the interests of authors and of the reading public as well as of the booksellers and publishers, and we now ask the kind interest and co-operation of our patrons in our effort to restore the general book trade and the business of bookselling to the high character and honorable calling which it has enjoyed, to the great satisfaction of all concerned."

Mr. OLIN: Objected to as immaterial and irrelevant and I advise the witness not to answer.

X Q. 125. Do you know whether these resolutions were
86 adopted after deliberation by the American Publishers' Association and the American Booksellers' Association, after having read to you that paragraph from the circular attached to your affidavit?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent, and I advise the witness not to answer.

X Q. 126. I ask you whether this statement appearing in a circular issued on the 7th day of August, 1902, of the American Booksellers' Association is a true statement of the facts:

"By special arrangement entered into with the organization committee of the American Publishers' Association, the members of our association are bound not to buy, nor to put in stock nor to offer for sale the books of any publishers who shall finally decline to co-operate with us in the maintenance of the net price system by joining the American Publishers' Association and issuing books under the net price system."

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and because it has nothing to do with the issues, and the American Booksellers' Association has nothing to do with the plaintiffs, nor is there any relation between them and the American Publishers' Association, and I advise the witness not to anwser.

X Q. 127. I ask you whether this is a true statement of the facts as contained in the same circular letter of the American Booksellers' Association:

"Inasmuch as the publishers have carried out their part of the agreement upon which our contract was conditioned, it now becomes necessary for us to preserve our part of the agreement."

Is that statement as contained in that circular a statement of the fact?

Mr. OLIN: Objected to as incompetent, and not the proper way to examine a witness, to ask him if a statement in a circular about which he is not shown to have any knowledge, and with which he is not shown to have any connection, is a fact.

87 X Q. 128. I will ask you if that statement is true?

Mr. OLIN: I make the same objection, and I advise the witness not to answer.

X Q. 129. I will ask you if it is true that the publishers carried out the agreements upon which the conduct of the booksellers was conditioned?

Mr. OLIN: Objected to as immaterial, incompetent and irrelevant.

A. They had no agreement that I know of.

X Q. 130. Is it not a fact, Mr. Emory, that the American Booksellers' Association co-operated with the American Publishers' Association in the maintenance of the so-called net price system introduced by the various resolutions adopted since May, 1891?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. It depends a good deal on what you mean by co-operation. I don't know that they did, no.

X Q. 131. If you sent notice to the American News Company—is that concern a member of the Publishers' Association?

A. Yes.

X Q. 132. Are they also large wholesale dealers?

A. Yes.

X Q. 133. Do you know whether they are members of the Booksellers' Association?

A. I don't know.

X Q. 134. Is the Baker & Taylor Company a member of the American Publishers' Association?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. I think they are now.

X Q. 135. They are now?

A. Yes.

X Q. 136. Were they at the time you were manager?

A. I think they did come in, yes, the latter part of the time.

X Q. 137. Before the time that they became members of the American Publishers' Association, they were large wholesale dealers and jobbers in books in the City of New York?

A. Yes.

88 X Q. 138. Prior to their joining the Publishers Association you sent them a notice not to sell to certain individuals?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. Yes.

X Q. 139. Do you know whether they obeyed?

A. I believe they did.

X Q. 140. That is the character of co-operation which I meant

when I asked you the question before, did the large wholesale dealers, members of the American Booksellers' Association, co-operate with you either by furnishing you with notice of price cutting or by obeying your requests not to deal with the price cutters?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. So far as the notice of price cutting was concerned, I may have been informed by individual members of the association or by members outside of the association. In fact, I have a distinct recollection that I was informed in different cases by both. So far as co-operation is concerned, there were members of the Booksellers' Association to whom, on certain occasions, we sent notices, and presumably they conformed to them as individuals.

X Q. 141. Do you not know as a matter of fact that the notices you sent out were very generally obeyed?

A. I believe they were.

X Q. 142. And do you not know as a matter of fact that until you had sent out notices that a certain individual was not to be supplied with books the trade in general did supply him with books, so that only after your notice was sent out did the trade at large refrain from dealing with the price cutters?

A. That is correct.

X Q. 143. And if a bookseller failed to obey, he was cut off, was he not?

A. The plan provides that.

X Q. 144. Well, as a matter of fact, I ask you if the plan was carried into effect?

A. Yes, the plan was carried into effect.

X Q. 145. And up to the year 1903, when your connections with the American Publishers' Association terminated, that plan was sought to be enforced to the fullest extent against R. H. Macy & Company?

A. Yes.

89 X Q. 146. Every effort was made to cut off their total supply of books, was it not?

A. Yes.

Redirect examination by Mr. OLIN:

R. D. Q. 147. Did I understand you to say in answer to a question of Mr. Wise that this agreement, Defendant's Exhibit A was intended to be a dead letter, or purely formal?

A. No, I did not intend to give that impression. When the association was first formed the plan was sent out with the letter, and the trade, as a rule, conformed with the terms of the plan. We found out afterwards that people were coming into the market that we knew nothing about, and we thought that it might be connected with the under-sellers in some way, and there were also houses which sold books only once a year, about Christmas time, and in order to insure their maintenance of the prices, we got this agreement signed.

By Mr. WISE:

X Q. 148. I understood you to say that they were not compelled to sign it, and that they still got books?

A. Such cases have happened, yes.

X Q. 149. I am not talking of exceptional cases, but the general rule. If such individuals as you have mentioned had not joined the association or agreed to abide by the rules in the first instance, when they were asked to sign one of those papers, and refused to do so, was he, as a rule, supplied with books?

A. No, I think not, as a rule, but on the other hand there were very few objections: I remember one or two that we waived their disinclination to sign the agreement.

X Q. 150. It was not a dead letter as Mr. Olin suggested, but it was intended to compel the individuals purchasing books who had not already entered into some arrangement to become a party to it?

A. Yes, it was intended to insure the maintenance of prices on the part of those buyers, that is what it was for.

X Q. 151. In your direct testimony, you said that no attempt was made to limit the supply of books by the Publishers' Association. What do you mean by that?

90 A. There was no attempt made to limit the number or quantity of books that publishers should publish.

X Q. 152. But there was an attempt made to limit the supply of R. H. Macy & Company?

A. There was an attempt made to stop their supply, yes.

X Q. 153. When you say no attempt was made to limit the supply of books, you referred to the publisher being permitted to publish books?

A. Yes; I referred to his output.

X Q. 154. But you did not mean that he should not have a limit as to whom he would sell the books?

A. No, if he was a member of the association. No publisher was governed by the rules of the association unless he was a member.

X Q. 155. You did not interfere with the supply of any other publisher?

A. No.

By Mr. OLIN:

R. D. Q. 156. Did you at the time of this conversation with R. H. Macy & Company notify them that they could receive books freely in case they would not cut prices?

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

A. Yes.

R. D. Q. 157. What did they answer to that?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They said in effect that they would not agree to maintain prices.

R. D. Q. 158. The witness, Miss Kinnear, stated yesterday that

certain persons were blacklisted for supplying R. H. Macy & Company, as follows: William Jackson, New York, Colonial Book Store, Boston, Mass.; New Bedford Dry Goods Company, New Bedford, Mass.; E. E. Baldwick, New York; N. Snellenberg & Co., Philadelphia, Pa.; Sherwood & Son, Meriden, Conn.; I. & M. Ottenheimer, Baltimore, Maryland; Hunter & Hunter, Detroit, Mich.; Owen Mines, 383 Fourth avenue, New York; are you able to say whether the notice and circulars which you have stated were sent to the trade were sent to these persons whose names I have given?

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Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, they were to most of them, anyhow. I do not refer to notices cutting off R. H. Macy & Company.

R. D. Q. 159. Are you able to say whether the notice not to supply R. H. Macy & Company was conveyed to those persons?

Mr. WISE: Objected to as irrelevant, incompetent and immaterial.

R. D. Q. 160. And that R. H. Macy & Company were cutting rates?

A. I don't think they were to most of them.

R. D. Q. 161. Were they notified before they were cut off in any way not to supply R. H. Macy & Company?

A. Some of them were.

GEO. S. EMORY.

Sworn and subscribed to before me this 18th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

RUDOLPH C. STOLLE, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name, residence and occupation?

A. Rudolph C. Stolle; I reside at 155 West 140th street, and I am second in the wholesale department of Charles Scribner's Sons.

Q. 2. How long have you been second in the wholesale department of Charles Scribner's Sons?

A. About fourteen years.

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Q. 3. Are you fully acquainted with the method of doing business in that wholesale department?

A. I am.

Q. 4. And the transactions during the last four years in that department have come under your notice?

A. Yes.

Q. 5. They have been within your knowledge?

A. Yes.

Q. 6. Will you state the methods of selling books at wholesale in

use by the complainants, Charles Scribner's Sons since the formation of the American Publishers' Association?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. A salesman goes, in most cases—that is to say, for stock orders, a salesman goes to a dealer and takes his order, and in other cases the dealer orders by mail or sends a messenger if he happens to be a New York dealer.

Q. 7. What has been done by the complainants with regard to the rules as to net prices and discount allowed on fiction fixed by the rules of the American Publishers' Association?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They have printed a notice on the catalogue and on all the bill heads declaring that the books are sold only with the understanding that the purchaser shall abide by the rules of the association.

Q. 8. I show you the catalogue of Charles Scribner's Sons, publication for 1903, and call your attention to the notice on the first page. Has that appeared in all the catalogues of the house, a like notice?

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

A. All the general catalogues.

Mr. OLIN: I offer it.

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

93 The paper referred to was marked "Complainant's Exhibit No. 9, August 25, 1904."

Q. 9. Will you produce a bill head of the firm of Charles Scribner's Sons?

A. That is one.

Mr. OLIN: I offer it in evidence.

Mr. WISE: Does that come under the control of the witness, the bills?

The WITNESS: I superintend that part of it, yes.

Mr. WISE: I object to it as incompetent, irrelevant and immaterial.

The paper referred to was marked "Complainant's Exhibit No. 10, August 25, 1904."

Q. 10. Are all the bills of Charles Scribner's Sons for dealings with the wholesale department rendered upon like bill heads?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. 11. Is any other method taken to bring the rules of the association to the notice of purchasers in the wholesale department?

Mr. WISE: Objected to as incompetent, immaterial and irrelevant.

A. Not by Charles Scribner's Sons.

Q. 12. When a new firm comes to deal with Charles Scribner's Sons that is unknown to you, what do you do?

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

A. We get what information we can as to their standing and whether or not they will be willing to maintain the rules of the association by referring the matter to the association for investigation, or sometimes by sending them this blank which has been presented.

Q. 13. Do you refer to Defendant's Exhibit A?

A. Yes, sir.

94 Q. 14. Can you say whether or not these rules are, in one way or another, brought to the attention of every purchaser from the wholesale department?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 15. They are not brought to their notice?

A. Except in the way I have described, by the bill heads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases.

Q. 16. Have any sales been made by Charles Scribner's Sons since the adoption of those rules in their wholesale department except subject to those rules?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 15. They are not brought to their notice?

A. Except in the way I have described, by the bill heads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases.

Q. 16. Have any sales been made by Charles Scribner's Sons since the adoption of those rules in their wholesale department except subject to those rules?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 17. Does that apply to sales to jobbers and wholesalers?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. 18. And all persons purchasing by wholesale?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

95 Q. 19. Does the firm of Charles Scribner's Sons sell any of their copyright books to persons known to cut the net prices?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 20. Or to any persons known to sell at a greater discount than 28 per cent. in cases of books of fiction?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They do not.

Q. 21. Has the firm of Charles Scribner's Sons, since the adoption of the rules of the Association sold at wholesale any of their copyright books to any person known to furnish books to rate cutters?

Mr. WISE: Objected to as incompetent, irrelevant, and immaterial.

A. They have not.

Q. 22. Is the course of Charles Scribner's Sons in that respect fully known to the trade?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial, and on the ground that the witness cannot speak of his own knowledge.

A. Yes.

Q. 23. Is it fully known to dealers who purchase at wholesale copyright books from Charles Scribner's Sons?

Mr. WISE: I make the same objection.

A. I think it is.

Q. 24. Does what you have said about the method of selling books by Charles Scribner's Sons apply to copyright books mentioned in paragraph 9 of the complaint?

A. Yes.

Q. 25. Have any of those books been sold at wholesale by Charles Scribner's Sons except on the terms which you have mentioned, as to the rules of the American Publishers' Association?

96 Mr. WISE: Objected to as incompetent, irrelevant, and immaterial.

A. They have not.

Q. 26. Have they been sold at wholesale except with the bill heads and notice such as have been put in evidence?

Mr. WISE: I object to it as immaterial, irrelevant and incompetent.

A. No, sir.

Q. 27. Referring to the list of books contained in paragraph 9 of the bill of complaint, which I have just shown you, are you able to say whether or not large numbers of those books have been printed and published?

A. Yes.

Q. 28. Numbers of volumes, counted by thousands?

A. Yes.

Q. 29. Is it possible for you to tell in all cases whether a book for sale in the open market has been sold by you at wholesale to one jobber or to another jobber?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Any particular book?

Q. 30. Yes.

A. I don't know that I grasp the meaning of your question.

Q. 31. Is it easy or difficult for you to tell whether certain books on the counter of a retail dealer have been sold by you to one wholesale dealer or to another wholesale dealer or jobber?

A. In some cases they are marked.

Q. 32. But as a rule it is difficult for you to tell that?

A. Yes.

Q. 33. In any particular instance of underselling by a retailer is it easy or difficult to know what wholesaler received these books from you?

A. It is difficult unless it happens to be marked.

Cross-examination by Mr. WISE:

X Q. 34. Is it not a fact that Charles Scribner's Sons mark most of their books that they sell?

A. They do not.

97 X Q. 35. Can they without the identification mark tell who purchased the books in the first instance from them?

A. They cannot.

X Q. 36. It is not difficult, but it is impossible?

A. You are speaking of a particular volume?

X Q. 37. Yes, I am talking about a particular volume?

A. They cannot.

X Q. 38. You are sure that no sales were made by Charles Scribner's Sons to any retailer who did not maintain the net price of books since May, 1901?

A. Not after we were informed that they failed to maintain the price.

X Q. 39. Who informed you?

A. The American Publishers' Association.

X Q. 40. Did they inform you each time that a price cutter was discovered, or did they furnish you with a list?

A. They informed us each time.

X Q. 41. And they did not furnish you with a list of names?

A. They also furnished us with a list.

X Q. 42. Can you produce that list of names?

A. I cannot at the present time.

X Q. 43. Is it in your possession?

A. I have it in my office.

X Q. 44. Can you produce it here in Mr. Olin's office?

A. I can.

X Q. 45. In case you ascertained individually that a book published at a net price or a restricted price, were sold by a retailer at a lesser figure, did you stop selling to that individual, or did you wait until you got a notice to stop from the American Publishers' Association?

A. We stopped selling immediately.

X Q. 46. You are quite sure?
A. Yes.
X Q. 47. Without a notice?
A. Without a notice.
X Q. 48. Did you continue to stop selling them, cut them off from your list of customers?
A. No, we stopped selling them pending an investigation made by the association, and after the investigation was made, we generally received a report as to whether or not the price would be restored.
98 X Q. 49. Did you receive a notification from the American Publishers' Association whether the price was being restored, or whether the individual dealer could be dealt with again by you?
A. Yes.
X Q. 50. What was the notification?
A. A general notice that the individual dealers had given definite assurance that he would maintain prices in the future, and on the strength of such notice we again supplied books to that dealer.
X Q. 51. That is the invariable rule?
A. Yes, sir.
X Q. 52. It never was broken?
A. No, sir.
X Q. 53. Do you recall that the firm of Simpson, Crawford & Simpson, and the firm of Frederick Loeser & Company advertised and sold net books published by Scribner and others at less than the net price?
A. I do.
X Q. 54. Were they cut off?
A. Temporarily, yes.
X Q. 55. On what basis were they restored?
A. We received notice, as I remember it, from the association declaring that they had agreed or given sufficient assurance that they would restore the proper price.
X Q. 56. Did they?
A. They did to my knowledge, as far as I know.
X Q. 57. They did to your knowledge, as far as you know?
A. So far as I know.
X Q. 58. Is it not a fact that the American Publishers' Association permitted the sale of books by Charles Scribner's Sons to Frederick Loeser and to Simpson, Crawford & Simpson for specific periods at less than the net price at which those books were published, and that they were not punished for so doing?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Not until after they had given the assurance that I speak of.
X Q. 59. Is it not a fact that they cut the price with the
99 knowledge and consent of the American Publishers' Association, and that that was known to Charles Scribner's Sons?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I think so.

X Q. 60. Is it not a fact that you sell books to Siegel-Cooper & Company?

A. Yes.

X Q. 61. Is it not a fact that on every net price book sold by them they give a rebate?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I don't know of any rebate.

X Q. 62. Is it not a fact known to you that every book sold in the store of Siegel-Cooper & Company is sold at a discount practically approximating from three to seven per cent.?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Not to my knowledge.

X Q. 63. Do you know whether the firm of Siegel-Cooper & Company has a trading stamp system?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I do.

X Q. 64. Do you know that with each book bought in that store a trading stamp of sufficient quantity is given to make a reduction varying from three to seven per cent.?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I think so, but I have no definite knowledge.

X Q. 65. Has Siegel-Cooper & Company been cut off from their supply of books by the Publishers' Association or Charles Scribner's Sons?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

100 A. Not by Charles Scribner's Sons.

X Q. 66. Charles Scribner's Sons sold, and have continued to sell to Siegel-Cooper & Company the books mentioned in paragraph 9 of the complaint?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Yes.

X Q. 67. They have bought them in large quantities?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Yes.

X Q. 68. Has Siegel-Cooper & Company been cut off from their supply of books by any other publishing house?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Not to my knowledge.

X Q. 69. They are considered in good standing?

A. Yes, sir.

X Q. 70. Does the same statement apply with all the department stores that conduct retail book stores and issue trading stamps?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. Yes, I think so.

X Q. 71. Can you tell me whether special firms were permitted to cut the prices of net books, or restricted price of books in order to meet the competition of R. H. Macy & Company?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. No, sir.

X Q. 72. You have no such knowledge?

A. No, sir.

X Q. 73. Do you know whether any such permission was given to any department store where a neighboring or rival department store had refused to join or had cut the price?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I do not.

101 X Q. 74. Are you aware that for a period of something like three months Frederick Loeser & Company were permitted to cut the price of all copyrighted books?

A. No, sir.

X Q. 75. For how long a period was it?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. My recollection of that was that it applied to books that did not come under the rule.

X Q. 76. What books?

A. Why books not restricted in price.

X Q. 77. What interference could the association have as to books not restricted in price?

A. My recollection is that we supplied some books of that character at a special discount.

X Q. 78. Books of what character?

A. Books that did not come under the rules of their association.

X Q. 79. Then you sold your own books which did not come under the rules of the association?

A. I think we sold a few items at a special price.

X Q. 80. Can you state which ones?

A. I cannot.

X Q. 81. Do you follow the advertisements of the great department stores, especially when they are accused of cutting prices?

A. I don't follow them; I see them occasionally.

X Q. 82. Do you know the book "Gordon Keith," written by Thomas Nelson Page, published by your house?

A. Yes, sir.

X Q. 83. Was that published at a net price?

A. No, sir.

X Q. 84. At a restricted price?

A. Restricted price.

X Q. 85. What was that price?

A. The understanding was that no dealer should sell it at less than 28 per cent. at retail.

X Q. 86. 28 per cent. from what?

A. $1.50.

102 X Q. 87. Which would make it $1.08?

A. Yes, or 33⅓ when supplied to a library.

X Q. 88. Do you not know that the book "Gordon Keith" was sold freely and without any interference on the part of the association by Frederick Loeser & Company, of Brooklyn, during the periods of restriction according to the terms of your circular at 79 cents per copy?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I do not.

X Q. 89. Do you know whether it was sold or not at a less price?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. With our consent, you mean?

X Q. 90. I didn't ask you that. I asked you whether you knew it was sold by Frederick Loeser & Company, of Brooklyn?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I do not.

X Q. 91. Do you know whether it was sold by anybody else outside of R. H. Macy & Company?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I know of no such case, no.

X Q. 92. Do you know whether it was sold by Simpson, Crawford & Simpson?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I think it is possible, but I couldn't say definitely.

X Q. 93. If it was done, were they cut off from their supply of books by you without warning from the Publishers' Association?

A. They were.

103 X Q. 94. You are positive of that?

A. They were temporarily cut off, yes.

X Q. 95. They were restored when?

A. As I remember it, it was a short time afterwards, when they had given the proper assurances to the association.

X Q. 96. What were the proper assurances?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and because there is no foundation for the question.

A. I mean when they had given satisfactory promises.

X Q. 97. Promise of what?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. To restore and maintain prices in accordance with the rules of the association.

X Q. 98. Are you sure that was the promise that was exacted?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I cannot testify to that, no.

X Q. 99. All you know is that they were restored by the American Publishers' Association, and that you did not know what the ground of restoration was?

A. I was informed that it was on that ground.

X Q. 100. By whom?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. I think it came by notice from the association.

X Q. 101. That they had been restored?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. I can't state definitely just how it happened. I think it came through the association.

X Q. 102. You don't know what pledges they gave further than you assume that they gave some pledge?

A. I do not.

The witness coming in this day to read over and sign his
104 deposition says he wishes to correct his answers to X Q. 58 by saying: "It is not" and to X Q. 59 by saying "No."

RUDOLPH C. STOLLE.

Sworn to before me this 19th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

GEORGE W. HARPER, JR., a witness called in behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name and occupation?

A. George W. Harper, Jr., and I am a law student.

Q. 2. You have been in the office of the complainant's solicitor for some years, have you not?

A. I have, yes, sir.

Q. 3. On Saturday, November 7, 1903, did you go to the book department of R. H. Macy & Company?

A. Approximately at that time, I did.

Q. 4. Did you see any of the books which are mentioned in this complaint?

A. I did, a number of them.

Q. 5. Can you tell which you saw there?

A. I was in the store on various occasions and I noticed different books at different times. I recall seeing "Little Shepherd of Kingdom Come," and "Gordon Keith."

Q. 6. How many volumes of "Little Shepherd of Kingdom Come" did you see approximately?

Mr. WISE: Objected to as incompetent. We acknowledge that we sold them freely.

Mr. OLIN: Will you concede that you sold them by hundreds?

Mr. WISE: No, because we have not.

A. As a conservative estimate there were 400 copies of "Little Shepherd of Kingdom Come" on sale there at one time.

Q. 7. Did you notice any signs in the store at the time you were there?

105 A. Yes, I did, and I made copies of a number of them.

Q. 8. Can you produce copies of those signs?

A. Yes. This is an affidavit to which I swore giving the copy of three signs that I had made of them that day.

three signs that I had made of them that day.

Q. 9. Read the signs?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. "The book trade has not yet driven us out of business. We sell books cheaper than any other house." Another sign read "All net books sold ten per cent. less than other houses." The word "net" is in parenthesis. The third sign read "All new fiction 98 cents sold elsewhere $1.08."

Mr. OLIN: That is all.

Mr. WISE: I have no questions.

GEORGE W. HARPER, JR.

Sworn and subscribed to before me this 20th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

FERNAND C. J. TESSARO, a witness called on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name and residence?

A. Fernand C. J. Tessaro; 510 Schenck avenue, Brooklyn.

Q. 2. You are manager of the American Publishers' Association, are you not?

A. I am.

Q. 3. How long have you been such?

A. Since October, 1903.

Q. 4. Have R. H. Macy & Co. been restored to the list of people to whom members of the association can freely sell books?

A. They have not.

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

106 Q. 5. Has the association authorized the sale of copyright books to any person known to cut rates?

A. No, sir.

Mr. WISE: I presume that is from the time which he took charge?

Mr. OLIN: Yes, I merely ask him as from the time that he took charge.

Cross-examination by Mr. WISE:

X Q. 6. Mr. Tessaro, do you know whether the association has permitted the sale of books, copyright books, to Siegel-Cooper & Company?

A. Yes, sir.

X Q. 7. Do you know that the Siegel-Cooper Company issues trading stamps with each net book sold by them?

A. They do not issue the trading stamps with net books except when trading stamps are asked for.

X Q. 8. Do you know that any individual that purchases a net book can obtain a trading stamp?

A. If they ask for them, yes, sir.

X Q. 9. And do you know that the trading stamps constitute a discount varying from 3 to 7 per cent. on such net books?

A. No, sir, I do not.

X Q. 10. Do you know that it constitutes any discount?

A. I do not.

X Q. 11. The trading stamp has no value?

A. Not that I know of.

X Q. 12. None at all?

A. Not that I know of.

F. C. J. TESSARO.

Sworn and subscribed to before me this 18th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

107 Circuit Court of the United States, Southern District of New York.

CHARLES SCRIBNER ET AL.
vs.
ISAIDOR STRAUS ET AL.

In Equity.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, an examiner, duly appointed by the Circuit Court of the United States for the Southern District of New York do hereby certify, that the foregoing are the proofs for final hearing taken before me in the above entitled cause on the part of the complainants under and pursuant to the 67th Rule of the Supreme Court of the United States as amended.

I do hereby further certify, that I am not of counsel nor attorney for either of the parties, nor in any wise interested in the event of the said cause.

I further certify, that Mr. Stephen H. Olin appeared on the part of complainants and Mr. Edward E. Wise appeared on the part of defendants in the taking of said proofs.

JOHN H. SHIELDS, *Examiner.*

108 *Stipulation as to Facts.*

United States Circuit Court, Southern District of New York.

CHARLES SCRIBNER and Another, etc., Complainants,
against
ISIDOR STRAUS and Another, Defendants.

It is hereby stipulated and agreed that the defendants herein, or their authorized agent, purchased of each of the books named in the bill of complaint herein such as are set forth by name upon the list hereto annexed marked Exhibit "A" at wholesale from wholesale booksellers at wholesale prices upon the dates and in the quantities and at the prices in said list marked "A" fully set forth, between the date of copyrighting of each of the said books and the 1st day of January, 1904.

And it is further stipulated and agreed, that between the dates aforesaid the defendants, or their authorized agent, purchased at retail from booksellers at regular retail prices a number of copies of each book named in the list aforesaid amounting in the aggregate to not more than ten per centum of the total number of copies of the same book purchased at wholesale as set forth in the aforesaid Exhibit "A" hereto annexed. And it is further stipulated and agreed, that of the books above mentioned the defendants above named, or their authorized agent, continued to purchase, during the period of one year subsequent to the date of copyright as set forth in the complaint herein, at wholesale from wholesale booksellers at wholesale prices a proportion of the total number of copies of each of said books purchased by them, equal to that above indicated—that is to say, approximately 90 per cent. thereof at wholesale at wholesale prices from wholesale booksellers, and not more than 10 per cent. thereof at retail at the regular retail prices established for each of said books by the complainants.

109 And it is stipulated and agreed further, that the following named books were purchased at wholesale from wholesale booksellers at wholesale prices between the date of the copyrighting of each of said books and the first day of January, 1904, in approximately the quantities set opposite the name of each of said books, to wit:

The Turquoise Cup and the Desert	about	100 copies
Our Northern Shrubs	about	10 "
Middle-aged Love Stories	about	25 "
Letters of a Diplomat's Wife	about	25 "
Foes of the Red Cockade	about	25 "
In African Forest and Jungle	about	20 "
The Daughter of a Magnate	about	25 "

And it is stipulated and agreed, that the defendants purchased of each of the books last above mentioned at retail from booksellers at regular retail prices not more than ten per centum of the number

of copies above set opposite the name of each book. And it is further stipulated and agreed, that the defendants herein, or their authorized agent, during the period of one year subsequent to the date of the copyrighting of each book as set forth in the complaint herein, continued to purchase of each of the books last above mentioned at wholesale at wholesale prices from wholesale booksellers approximately 90 per cent. of the total number of copies of such book purchased by the defendants.

And it is stipulated and agreed further, that the following named books were purchased by the defendants, or their authorized agent, only at retail at the regular retail price from retail dealers, and each copy so purchased was thereafter re-sold to the purchaser from the defendants at cut prices, to wit:

In the Grip of the Mullah
Vacation Days in Greece
Our Feathered Game
The Meaning of Pictures
Horses Nine
The Principles of Money
Trees, Shrubs and Vines
The Modern Obstacle
A Doctor of Philosophy
In the War with Mexico
Poems
Reminiscences of the Civil War
Through Three Campaigns
My Wonderful Visit
Old London Silver
The Development of the Drama

It is stipulated and agreed further, that the term "wholesale prices" as used in the foregoing stipulation in reference to the purchase of books means prices lower than the price named by the complainants as the lowest price at which their books might be sold at retail by bookdealers.

It is also stipulated and agreed, that the list of names published in "The Book and Newsdealer" under the title "Dealers whose supply of copyrighted books has been stopped" contains the same names placed in the so-called cut-off list of the American Publishers' Association.

It is further stipulated and agreed, that the foregoing stipulation is made subject to all objections and exceptions by either party to the above entitled action as to the relevancy, materiality and competency of the facts stipulated which said party might have taken upon the taking of proof herein as to the said facts.

Dated 10th October, 1904.

STEPHEN H. OLIN,
Solicitor for Complainants.
SPIEGELBERG & WISE,
Solicitors for Defendants.

111 EXHIBIT A.

The Vagabond.

Sept.	14	25	copies	at	$.90	
"	18	25	"	"	.85½	
Oct.	15	25	"	"	.90	104
Dec.	19	19	"	"	.90	
"	21	10	"	"	.90	

Gordon Keith.

June	15	16	copies	at	$.97	
"	26	150	"	"	.85	
"	18	60	"	"	.90	
July	16	100	"	"	.90	
"	24	10	"	"	.90	
"	29	12	"	"	.90	
Aug.	8	10	"	"	.81	
"	31	50	"	"	.90	
Sept.	1	100	"	"	.81	938
"	3	70	"	"	.90	
Nov.	6	50	"	"	.90	
"	27	100	"	"	.90	
Dec.	18	100	"	"	.85½	
"	18	25	"	"	.90	
"	21	10	"	"	.85½	
"	24	25	"	"	.90	
"	29	25	"	"	.90	
"	28	25	"	"	.87	

The House on the Hudson.

Sept.	1	20	copies	at	$.85½	
"	18	20	"	"	.85½	58
Dec.	19	18	"	"	.90	

112 The Little Shepherd of Kingdom Come.

Sept.	14	100	"	"	$.85½	
"	12	25	"	"	.85	
"	18	50	"	"	1.50 less 2/5 & 7½ %	
"	14	110	"	"	1.50 less 2/5 & 7½ %	
Oct.	15	50	"	"	.90	
"	15	150	"	"	.90	
"	28	250	"	"	.85½	
Dec.	8	250	"	"	.85	
"	10	250	"	"	.90	1913
"	12	250	"	"	.87½	
"	18	250	"	"	.85½	
"	12	28	for		27.16	
"	30	150	"		125.25	

Colonel Carter's Christmas.

Oct.	15	75	"	"	$.90	
Nov.	21	25	"	"	.90	
"	30	50	"	"	.90	
Dec.	9	100	"	"	.85½	510
"	14	85	"	"	.90	
"	14	50	"	"	.90	
"	18	100	"	"	.90	
"	29	25	"	"	.90	

The Better Sort.

Aug.	18	10	copies at		$.75	15
Sept.	4	5	"	"	$.80	

No Hero.

May	7	50	copies at		$.72	50

The Under Dog.

July	7	50	copies at		$.90	
Aug.	12	13	"	"	.81	
"	18	25	"	"	.90	
"	17	10	"	"	.90	110
Sept.	3	20	"	"	.90	
Dec.	14	10	"	"	.90	

113 The Blood Lillies.

Oct.	20	15	copies at		$.85	15

The Weaker Sex.

Nov.	6	50	copies at		$3.05		
Dec.	18	25	"	"	3.15	125	
"	12	50	"	"	4.20	less 25% 2% cash disc.	

With the Allies to Pekin.

Dec.	14	24	copies at		$.90	24

Odd Craft.

Nov.	1	5	copies at		$.90	10
Dec.	29	5	"	"	.90	

Sanctuary.

Nov.	6	50	copies at		$.90	
Nov.	21	25	"	"	.90	
Dec.	9	25	"	"	.90	200
"	18	100	"	"	.85½	

114 United States Circuit Court, Southern District of New York.

CHARLES SCRIBNER and Another, etc., Complainants,
against
ISIDOR STRAUS and Another, Defendants.

STATE OF NEW YORK, *County of New York, ss:*

E. Lillian Kinnear, being duly sworn, says:
I am the manager of the Book Department of the firm of R. H. Macy & Company, composed of the defendants above named, and have been such for more than eight years last past. I have read the stipulation hereto annexed and to the best of my knowledge and belief the several facts therein stipulated to are true.

E. LILLIAN KINNEAR.

Sworn to before me this 11th day of October, 1904.
W. W. FITZHUGH,
Notary Public, Kings County.

Certificate filed in N. Y. County.

115 "COMPLAINANT'S EX. 1, AUG. 24, '04, J. A. S., EX'R."

American Publishers' Association.

Office of the Secretary, No. 66 Fifth Avenue,

NEW YORK, *October 1st*, 1900.

Dear Sirs: In order to learn the views of Booksellers upon the question of prices and discounts, the American Publishers' Association would be glad to receive replies from the trade to the questions which follow, and it is requested that you answer them as fully as seems best to you. The Association desires to proceed in a conservative manner and to create as little disturbance as possible. Such books as would be subject to the rules of the Association to be adopted would, of course, be protected by copyright, and the rates would apply only on books issued after a fixed date, to be agreed upon.

1. Would a system of absolute net prices, to be maintained throughout the country, be satisfactory to you?

2. Should all new copyright books be issued in this manner, at net prices, or in the beginning would it be better to make only certain classes of books—such as perhaps the more serious books—net, leaving novels and some other popular classes to be issued at regular retail prices as at present?

3. In case such a system of net prices is adopted, would it, in your opinion, be possible to absolutely guarantee this price to every purchaser of the book at retail, whether belonging to the clergy, professional, or other class hitherto specially favored in the matter of discount (the only exception being in the case of libraries)?

4. If the publishers should exact postage upon books sent by mail, would this give the bookseller all the protection he could fairly demand against direct supply from the publisher?

5. Will you kindly say whether in your opinion a discount should be made to libraries, and, if made, whether 10 per cent. is enough for the purpose?

6. From the net prices as indicated above it is suggested that to *bona fide* booksellers carrying a stock of books a general discount of 25 per cent. be allowed, some shorter discount than this being allowed to all other dealers in books, provided, of course, that the price is never cut. Would this discount plan be satisfactory to you, and is the discount offered, in your opinion, sufficient for books that are sold to the public at the net prices?

116 *Extra discounts would be offered for quantity purchases, but for quantity purchases only, and with a view to making the purchaser of the larger quantity insure himself a larger profit for his speculation.*

7. Would you keep in stock such net books, the prices of which were maintained, so long as these books were reasonably in demand?

8. Would you agree absolutely to maintain such net prices, and would you agree in case the prices of such books were cut, not to cut them in return, but to present the evidence to the Publishers' Association of such cutting of rates and allow the Publishers' Association thirty days in which to remedy the evil (*i. e.*, the aforesaid cutting of prices) before cutting prices in rebuttal?

9. No penalty can probably be attached to the breaking of prices, excepting that the publishers will sell to dealers who break the prices of these net books only at the net price and without discount, and all booksellers will be asked to agree to a similar provision, viz., that they will not sell to dealers who cut prices except at the regular list prices without discount. Do you think this provision would be sufficient to prevent the cutting of prices, and would you agree not to sell to dealers except at the list price if you were informed by the Publishers' Association of any dealer so accused of cutting the prices?

10. Are you willing to join a Booksellers' Association, with nominal dues, which shall undertake through its committees to inform the Publishers' Association in regard to cases where the price of any book is cut, the Booksellers' Association, if formed, to pay the expense of its own committees for the collection of such evidence in all cases where requested to do so by the Publishers' Association?

117 *While it may appear that the questions as outlined above indicate a certain policy to be followed possibly by the American Publishers' Association, I am instructed to say that the direction of such action is not yet determined and if therefore you should desire to outline a policy for the conduct of the business looking to the control of prices in some way or other, whether by the limitation of discount or otherwise, that would in your opinion answer the purpose (viz., the improvement of the conditions of the retail book trade) the Association would be most glad to have such outline of a*

plan from you and will give it due consideration before taking action in the matter.

An early reply is respectfully requested and a full answer to each question by referring to it by number particularly desired.

Yours respectfully, GEORGE P. BRETT,
Secretary, American Publishers' Association.

"COMPLAINANT'S EX. 2, AUG. 24, '04, J. A. S., EX'R."

The American Publishers' Association, 156 Fifth Avenue, New York.

The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

I. That the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

II. It is recommended that the Retail Price of a net book, Marked NET, be printed on a paper wrapper covering the book.

118 III. That the Members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carry stock of them for public sale.

IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than ten per cent.

Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount.

V. That the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VI. That after the expiration of a year from the publication of any such net copyrighted book, dealers shall not be held to the above restrictions and may sell such book at a cut price, but if on

learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so re-sold to him on demand.

VII. That when the publisher sells at retail a book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

VIII. That for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all
119 cases of cutting reported, and when directed shall send out notices to the Association, jobbers, and the trade, or any person violating the above provisions.

IX. That it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

X. That the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which association shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XI. That the Report when adopted by the Board of Directors be submitted to the Association and voted upon in accordance with the Association's Rules, Article II, Section 1.

"Complainant's Ex. 3, Aug. 24, '04, J. A. S., Ex'r."

The Sun, Tuesday, April 19, 1904.

R. H. Macy & Co.'s Attractions Are Their Low Prices.

MACY'S

B'way at 6th Av. 34th to 35th St.

$1.08 Books at 98c.

Publications You Cannot Buy Elsewhere Under Trust Prices.

Main Fl., rear.

All other dealers, under pressure of a compact with the Book Trust, are forced to charge $1.08—no less—for late publications. Our price is 98c.—and this is one bit of evidence to support the claim that on everything else we sell our prices are lower than others ask

for equal qualities. Some amusing squirming is done by the Trust-tied dealers in explaining the price difference.

120 Sir Mortimer, by Mary Johnston.
The Deliverance, by E. Glasgow.
Little Shepherd of Kingdom Come, by J. Fox, Jr.
Order No. 11, by Stanley.
Tomaso's Fortune, by Seton Merriam.
The Yoke, by Elizabeth Miller.
He That Eateth Bread With Me, by M. Keyes.
Shutters of Silence, by Burgin.
My Friend Prospero, by Harland.
The Yellow Van, by Whiteing.
The Long Night, by Weyman.
Hesper, by H. Garland.
Forest Hearth, by C. Major.
The One Woman, by Dixon, Jr.
The Peril of the Sword, by Harcourt.
Proud Prince, by McCarthy.

98c

Rebecca, by Wiggin..... 86c
Stone of Destiny, Mackay..... 86c
Richard Baxter, by F. Jones..... 69c

"Complainant's Ex. 4, Aug. 24, '04, J. A. S., Ex'r."

Sun, Dec. 6th, 1902.

R. H. Macy & Co.'s Attractions Are Their Low Prices.

MACY'S

B'way at 6th Av. 34th to 35th St.

During the week preceding Christmas the store will close at the usual hour, 6 o'clock.

Removed to BROADWAY at SIXTH AVE. 34th to 35th St.

While we have the largest and probably the best equipped building in the world devoted to retailing, our chief attractions will continue to be as they have been in the past—Our Low Prices and Reliable Qualities.
THE OLD STORE AT 14TH STREET AND 6th AVENUE IS CLOSED.

121 Books.

Thanks to the publishers for tying competitors "hand and foot," even if they do offer balm to the tied ones *by refusing to sell us.* We particularly enjoy the opportunity of being able to have this illustration made with merchandise on which the "difference-of-quality" expedient cannot be utilized as an excuse for higher prices.

THE TRUST HAS THE PLEDGE OF ALL OTHER DEALERS NOT TO SELL THE FOLLOWING POPULAR BOOKS FOR LESS THAN $1.08.

Our Price 98c. Our Price.

Gabriel Tolliver—C. Harris.
The Splendid Idle Forties—Atherton.
Love and the Soul Hunters—Hobbes.
The Spenders—Wilson.
The Loom of Life—Gross.
Temporal Power—M. Corelli.
Richard Gordon—Alexander Black.
Hope Loring—L. Bell.
Donovan Pasha—Gilbert Parker.
The Two Vanrevels—B. Tarkington.
The Shadow of the Rope—Hornung.
The Vultures—Merriman.
A Girl Who Wrote—Alan Dale.
A Song of a Single Note—A. Barr.
The Mississippi Bubble—Hough.
The Leopard's Spots—Dixon.
Whom the Gods Destroyed—Daskam.
Paul Kelver—Jerome K. Jerome.
The Red House—Nesbit.
Winslow Plain—Greene.
The Fortunes of Oliver Horn—H. Smith.
A Speckled Bird—A. Evans.
The Long Straight Road—Horton.
Blue Flowers—Van Dyke.
Captain Macklin—R. H. Davis.
The Banner of Blue—Crockett.
Wolfville Nights—Lewis.
122 The Climax—Pidgin.
Fuel of Fire—Thorneycroft.
Istar of Babylon—Potter.
Moths and Rust—Cholmondeley.
Lizette—Marshall.
Miss Petticoats—Tilton.
The Double-barrelled Detective Story—Mark Twain.

The Cromptons—Mary J. Holmes, sold elsewhere at 75c.; our price 68c.

Glengarry School Days—R. Connor, sold elsewhere at 90c.; our price 84c.

New France and New England, sold elsewhere at $1.75; our price $1.49.

Border Fights and Fighters—Brady, sold elsewhere at $1.30; our price $1.17.

Hound of the Baskervilles—Doyle, sold elsewhere at 90c.; our price 79c.

However, books do not convey a just notion of the economy of the Macy prices in general, as compared to other stores. On other lines—the ones more difficult for inexperienced people to judge of qualities—the price differences in our favor are much greater. Sometimes we are half less than competition. Call it a quarter and you strike a fair average. 1st Floor, Rear.

"Complainant's Exhibit 5, Aug. 24, '04, J. A. S., Ex'r."

Times, March 14th, 1902.

R. H. Macy & Co.'s Attractions Are Their Low Prices.

MACY'S

Both Sides 14th St. from 13th to 15th, 6th Ave.

We sell more goods at retail for cash than any other store in America.

READ THIS, EVERYBODY.

Competitors—when continually undersold—indulge in unfair and absurd claims. The readiest subterfuge is an attempt to disparage our qualities. When confronted with the fact that
123 our prices are lower than theirs, they invariably try to explain the beat by attacking the character of our goods. How about Books? We use them to illustrate, because you *know* Books. They silence criticism. Our rates range from 10c. to $1.50 less than others ask for the same Books. We save you much more on other lines.

Audrey, by Mary Johnson, Author of To Have and To Hold ..... 91c.

The Methods of Lady Walderhurst, by Mrs. Burnett, at ..... 81c.

COMPLAINANT'S EX. 6, AUG. 25, 1904.

AMERICAN PUBLISHERS' ASSOCIATION.

Directors.

Charles Scribner, President.

A. C. McClurg, 1st Vice-Pres.	G. B. M. Harvey, Treasurer.
George H. Mifflin, 2d Vice-Pres.	George B. Brett, Secretary.
Daniel Appleton.	Frank H. Dodd.
Frank H. Scott.	Craige Lippincott.

George S. Emory, Manager.

156 Fifth Avenue, New York.
Telephone 3846 Eighteenth St.

To the Trade:

You are doubtless aware that the American Publishers' Association has been for some months engaged in formulating the details of a plan to correct some of the evils connected with the cutting of prices on copyright books. The result of this work will be found in the enclosed circular, which is being sent to the entire book trade of the United States.

It may be urged by some that this plan is not as far-reaching as might be desired. This ground may be well taken, but after carefully considering all the conditions we are convinced that to attempt to do more at this time would seriously endanger the success of the whole movement.

We think that the circular will make clear the conditions of sale of copyright books published after May 1st, 1901. Should there be any doubt on any subject, inquiries can be made of the
124 undersigned. Additional copies of the circular may also be obtained from him on request.

It is a fact generally accepted by the publishing and book selling trades that the fixing of retail prices is highly desirable, and we hope that this first organized attempt in the United States to accomplish this end will receive the earnest support of all jobbers and retailers.

Trusting that we shall hear from you in approval of the adopted plan, we beg leave to remain,

Yours very truly,

AMERICAN PUBLISHERS' ASSOCIATION,
GEORGE S. EMORY, *Manager.*

COMPLAINANT'S EX. NO. 7, AUG. 25, 1904.

The American Publishers' Association, 156 Fifth Avenue, New York.

The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

I. That the Members of the American Publishers' Association agree that all the copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided however that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

II. It is recommended that the Retail Price of a net book, marked *Net*, be printed on a paper wrapper covering the book.

III. That the Members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers
125 and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books carries stock of them for public sale.

IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than ten per cent.

Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount.

V. That the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher.

VI. That after the expiration of a year from the publication of any such net copyrighted book, dealers shall not be held to the above restrictions and may sell such book at a cut price, but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so resold to him on demand.

VII. That when the publisher sells at retail a book published under the rules it shall be at the retail price and he shall add the

cost of postage or expressage on all books sent out of the City in which the publisher does business.

VIII. That for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

IX. That it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

126 X. That the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XI. That the Report when adopted by the Board of Directors be submitted to the Association and voted upon in accordance with the Association's Rules, Article II, Section 1.

COMPLAINANT'S EX. NO. 8, AUG. 25, 1904.

American Publishers' Association.

Directors.

Charles Scribner, President.

Frank H. Dodd, 1st Vice-Pres.	G. B. M. Harvey, Treasurer.
George H. Mifflin, 2d Vice-Pres.	George P. Brett, Secretary.
Daniel Appleton.	Craig Lippincott.
Frank H. Scott.	W. F. Zimmerman.

George S. Emory, Manager.

156 Fifth Avenue.
Telephone, 3846 Eighteenth St.

NEW YORK, *June* 3, 1902.

To the Trade:

We beg leave to announce that, in compliance with the expressed wish of many important members of the trade, and to extend the protection to the price of fiction provided by the rules, the amendment printed below in bold-face type was adopted at a meeting of the American Publishers' Association held May 27th, 1902.

The rule covering fiction now reads as follows:

IV. That the members of the Association agree that on
127 all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be twenty-eight per cent., and all the rules for the protection of net books shall apply to the protection of fiction to this extent.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

When a work of fiction published under this rule is sent postpaid the price to the purchaser shall be not less than the minimum price plus the postage.

The above amendment takes effect immediately, and applies to all sellers of books.

We beg leave to again extend congratulations to the trade on the general satisfaction attending the operation of the protected price principle, and the firm foothold it has secured during the past year.

Yours very truly,

AMERICAN PUBLISHERS' ASSOCIATION.
GEORGE S. EMORY, *Manager.*

128 COMPLAINANT'S EXHIBIT NO. 9, AUG. 25, 1904.

Charles Scribner's Sons'

Catalogue of
Publications.

All Books sent Postpaid except where Postage is Indicated.

Note to the Trade:

Copyrighted Net books published after May 1st, 1901, and copyrighted fiction published after February 1st, 1902, are sold on condition that prices be maintained, as provided by the Regulations of The American Publishers' Association. On such books the month of publication is given except where the book is announced as In Press.

Books starred are mostly Educational and are subject to a slightly different discount to the Trade than other Net books.

COMPLAINANT'S EX. NO. 9, AUG. 25, '04.

American Publishers' Association.

Directors.

Charles Scribner, President.
A. C. McClurg, 1st Vice-Prest.
George H. Mifflin, 2d Vice-Pres.
Daniel Appleton.
Frank H. Scott.
G. B. M. Harvey, Treasurer.
George B. Brett, Secretary.
Frank H. Dodd.
Craige Lippincott.

George S. Emory, Manager.

156 Fifth Ave.
Telephone, 3846 Eighteenth St.

NEW YORK, *May* 8, 1901.

GENTLEMEN: Messrs. R. H. Macy & Company of New York having cut the retail price of a net copyrighted book and refuse to restore it until further advice, you will please decline to supply them with any of your publications as provided in the rules of the American Publishers' Association.

Yours very truly,

GEORGE S. EMORY, *Manager.*

129 American Publishers' Association.

Directors.

Charles Scribner, President.
A. C. McClurg, 1st Vice-Pres.
George H. Mifflin, 2d Vice-Pres.
Daniel Appleton.
Frank H. Scott.
G. B. M. Harvey, Treasurer.
George B. Brett, Secretary.
Frank H. Dodd.
Craige Lippincott.

George S. Emory, Manager.

156 Fifth Avenue.
Telephone, 3846 Eighteenth St.

NEW YORK, *May* 8, 1901.

GENTLEMEN: I beg leave to advise you that Messrs. R. H. Macy & Company of New York have cut the retail price of a net copyrighted book and refuse to restore it. In consequence of this will you please

decline to supply them with any book published by members of the American Publishers' Association, a list of which is enclosed herewith.

Yours very truly,

GEORGE S. EMORY, *Manager.*

130 COMPLAINANT'S EX. NO. 10, AUG. 25, '04.

All Claims for Allowance must be made within five days after receipt of Goods—Not Responsible for Books ordered sent by Mail, or sent out to be Packed.

153-157 Fifth Avenue,
Between 21st & 22nd Streets,
NEW YORK.....190

M.....

Folio..... .....

Bought of Charles Scribner's Sons,
Publishers, Importers and Booksellers.

Terms:—Net Cash. Payable with Exchange on New York.

Sent per.....

Copyrighted Net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association.

DEFENDANT'S EX. A, AUG. 25, '04.

American Publishers' Association.

.....190..

In consideration of discount allowed on books bought from .....we hereby agree that for one year from date of publication we will not sell *net* books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1st, 1902, at a greater discount than 28 per cent. at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers' Association to any dealer known to us to cut prices of *net* books or of new fiction except as above provided.

131 *Answer.*

Circuit Court of the United States for the Southern District of New York. In Equity.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Individually and as Co-partners Trading under the Firm Name and Style of Charles Scribner's Sons, Complainants,

against

ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name of R. H. Macy & Company, Defendants.

The joint answer of the defendants Isidor Straus and Nathan Straus, individually and as co-partners trading under the name of R. H. Macy & Company, to the bill of complaint of the above-named complainants.

I. These defendants saving and reserving to themselves all and all manner of benefit, advantage or exception which may be had or taken to the manifold errors, uncertainties, imperfections and insufficiencies in the said complainants' said bill of complaint contained, for answer thereto or unto so much and such parts thereof as they are advised are material for them to answer, answering say:

II. The defendants admit the allegations contained in Paragraphs I, II and III of said bill of complaint.

III. These defendants admit the allegations contained in Paragraph IV of the said bill of complaint in so far as the same alleges the incorporation of the American Publishers' Association under the laws of the State of New York, and in so far as it is
132 alleged in said paragraph that said Association has not attempted to limit the supply of books by its members to all jobbers and booksellers who will comply with the rules of the Association, and that members thereof have dealt and are dealing with all jobbers and booksellers who comply with the rules of the Association, but that they deny each and every other allegation in said paragraph contained.

IV. These defendants admit that the said American Publishers' Association made certain rules as alleged in Paragraph V of the complaint; that a copy of said rules adopted on February 13, 1901, and amended by resolutions adopted January 8, 1902, and May 27, 1902, are correctly set forth in Exhibit A, annexed to said bill, but they deny that the said rules were made or intended for the protection of the purchasing public or that said rules provided or were intended to provide that all purchasers of books at retail except public libraries should be able to buy copyrighted books at the same price without secret or other discounts or rebates.

V. These defendants admit, on information and belief, that the complainants have made all sales of books subject to the rules of American Publishers' Association as set forth in Paragraph VI of

the bill of complaint, but they deny that any of said sales were conditional sales, and they deny that in any of such sales there was any reservation to the complainants of an interest in such books sold, or any reservation of any rights secured by the copyright covering the same.

VI. These defendants have no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph VII of the bill of complaint and therefore require proof thereof.

VII. These defendants, for the purposes of this action, admit that the complainants took out certain copyrights as alleged in Paragraph VIII, and they furthermore, for the purposes of this action, admit all the allegations contained in the subdivisions of said Paragraph VIII, being Paragraphs VIII-1 to VIII-36, both inclusive.

VII. These defendants furthermore admit that the complainants made sales of said described books in accordance with the
133 rules and regulations of the American Publishers' Association, as set forth in Paragraph IX of the bill of complaint, but these defendants have no information sufficient to form a belief as to whether the complainants have at all times refused to sell to anyone any of said books, and, therefore, deny said allegation, and these defendants have no knowledge or information sufficient to form a belief as to whether every purchaser of such books had at the time of the purchase, full and complete notice of the conditions upon which said books were sold, or accepted the same as alleged in said Paragraph IX, and, therefore, require proof thereof. And these defendants deny that either by virtue of any alleged conditional sale of said books, or by reason of the copyrights issued thereupon, or by reason of both, have the complainants become entitled to the full performance of said alleged conditions in so far as these defendants are concerned, and, therefore, these defendants deny all the allegations contained in that portion of Paragraph IX of the bill of complaint, beginning at folio 174 with the words "that by virtue of the conditional sale of the said books" down to and including the end of said paragraph.

IX. These defendants deny all the allegations contained in Paragraph X of the bill of complaint, excepting that these defendants had knowledge of the rules and regulations of the American Publishers' Association, and that these defendants have sold and exposed for sale copies of books published under the copyrights owned by the complainants, but they specifically deny that they printed any of said copyrighted books, and deny that they have published any of said books covered by such copyright otherwise than by selling some of the books and delivering the same to the purchasers thereof.

X. These defendants deny all the allegations of Subdivision 2 of Paragraph X of the bill of complaint.

XI. These defendants deny all of the allegations contained in Paragraph XI of the bill of complaint.

And for further answer and defense herein the defendants allege:

1. That during the year 1900, the complainants and a large number of other publishers, for the purpose of securing to them-
134 selves an unreasonable and extortionate profit, and with the intent to prevent competition in the sale and supply of books

in the State of New York and throughout each and all of the States and Territories of the United States, and for the purpose of establishing and maintaining the retail price of all copyrighted books published by them or any of them, and of all books dealt in by them or any of them, and preventing competition in the sale and supply thereof in the State of New York and elsewhere throughout the United States, unlawfully, illegally and contrary to the public policy and statutes of the State of New York and of the United States, combined and associated themselves together and as a part of such unlawful combination or scheme formed and incorporated a membership corporation under the laws of the State of New York under the name of the American Publishers' Association, which included amongst its members the complainants herein and a large majority constituting about 95% in numbers and extent of business of the publishers of all books in the State of New York and throughout the United States.

2. And defendants say that in furtherance of said unlawful combination or scheme the American Publishers' Association and its various members, including the complainants herein, immediately after its organization adopted resolutions and entered into agreements with each other which were intended to prevent the cutting or reducing of prices on copyrighted books published by the members of the said Association, including the complainants herein, by which each of the members of the said Association, including the complainants, agreed that all copyrighted books published by any of them after May 1st, 1901, should be published and sold at retail at net prices, that is, the published price thereof, and not be subject to any discounts or reductions.

3. That as a part of said unlawful scheme and combination the members of the said Association, including the complainants herein, agreed that such net copyrighted books, and all other books whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail price of such copyrighted books for one year, and to those booksellers and jobbers only who would sell books at wholesale to no one
135 known to them to cut, or sell at lower figures than such retail price, or whose name should be given to them by said Association as one who cut such prices.

4. Defendants allege that an office was established by said American Publishers' Association for the purpose of carrying out the aforesaid plan, and the members thereof, including the complainants, agreed that through the agents of the said Association, and the members thereof, they would aid in the formation of a booksellers' association to co-operate with the said American Publishers' Association, to assist in said unlawful scheme to maintain the retail price of books as aforesaid, and prevent competition in the price and supply thereof in the State of New York, and elsewhere throughout the United States, and that the said American Publishers' Association and all the members thereof, including the plaintiffs, pledged themselves to support said booksellers' association by every means in their power.

5. That thereafter the American Booksellers' Association, composed of 90% in numbers and extent of business of the booksellers at wholesale and retail throughout the State of New York and the United States, was organized through the efforts and influence of the said American Publishers' Association and its members, including the complainants herein, for the avowed purpose of co-operating with the said American Publishers' Association and its members, in the unlawful purpose of maintaining the retail prices of copyrighted books and preventing competition in the sale of all books and in the price and supply of the same, whether copyrighted or not, in the State of New York, and throughout the United States and for the purpose of monopolizing trade or commerce in books among the several states, and for the purpose of restraining trade or commerce in books among the several states.

6. And defendants say that in pursuance of said unlawful agreement, neither of said associations nor any of the members thereof, including the complainants, would or will now sell or supply any books at any price, to any dealer in the State of New York, or elsewhere in the United States, whether a member of said associations or not, and whether such books were copyrighted or not, or
136 were or were not published by the said American Publishers' Association or its members who did not maintain said arbitrary retail price on copyrighted books, or who would re-sell, or was suspected of re-selling, such copyrighted books to any dealer who thereafter sold the same at less than the arbitrary price fixed by said unlawful combination.

7. That thereafter, to wit, on or about the 31st day of March, 1903, the said American Publishers' Association and its members, including the complainants, entered into a further agreement whereby it was agreed that on all copyrighted books and fiction (not net) which had been published by them after February 1st, 1902, and on all board books, flat picture books or toy books (not net) published by them after March 1st, 1903, the greatest discount allowed at retail for one year after publication should be 28 per cent., that all the rules and regulations theretofore agreed upon to fix prices and prevent competition in the sale of net books should apply to this extent to the sale at retail of fiction, and juvenile board books, published on the same basis as fiction.

8. That ever since May 1st, 1901, the two aforementioned associations and the respective members thereof, including the complainants herein, have unlawfully and contrary to the declared policy of the State of New York and its statutes and the statutes of the United States, maintained such combination whereby competition in the State of New York, and throughout all the States of the United States, in the sale and supply and price of books has been and is restrained or prevented, and whereby trade or commerce in books among the several states has been and is monopolized by the said combinations, and trade or commerce in books among the several states has been and is restrained, and whereby the free pursuit in the State of New York and throughout the United States,

of the lawful business of selling books has been, and is restricted or prevented.

9. That the purpose and intent of said unlawful conspiracy and combination was, and is, to establish and maintain increased and excessive prices for books, and thereby secure to the publishers and dealers who are members of said associations, including the
137 plaintiffs herein, an increased and extortionate profit, and that such purpose and intent has been and still is being carried into effect, and that by reason thereof the prices of books and the profits thereon have been and still are unreasonably increased.

10. That the members of the said American Publishers' Association, including the complainants, and the members of the said American Booksellers' Association, were at the time when said combinations were formed, and have been at all the times since then, and since the formation of said associations, and now are engaged in the business of interstate commerce. That the members of said associations, including the complainants herein, do now, and at all the times herein mentioned have, resided and carried on their business of selling books in many different States, and that in the conduct of their business as wholesale and retail dealers in books, the members of the said two associations, including the complainants herein, were, and now are, engaged in the business of purchasing books, copyrighted and non-copyrighted, from each other and from other persons in many States other than the States in which the purchaser resided, and now resides and does business; and all such books are and have been transported in compliance with the contract of purchase from the State where such books were purchased, to the purchaser in the State where he resides and conducts business. And members of both of said associations, including the complainants herein, also sell and have sold books to many persons who are not members in States other than the one in which they reside and conduct their business, and all such books are transported in compliance with the contract of purchase from one State to another.

11. That the members of the said two associations, including the complainants herein, do now and have heretofore conducted the production, sale, at wholesale and retail, and distribution of the majority of all books produced and dealt in throughout the State of New York, and all the other States and Territories of the United States.

12. The defendants say that all the rules, regulations and agreements made by the said two associations and *its* members, including the complainants, as hereinbefore set forth, were intended to
138 be applied to and be enforced, and have been and are now applied to and enforced, against all publishers and dealers in books, throughout all the States of the United States, whether such publishers and dealers are or are not members of either of said associations, and whether they purchase books in one State for transportation to another, or for delivery in the State where purchased.

13. That the complainants herein, and for the most part the other members who are publishers and members of the American

Publishers' Association, do now sell, and have at all the times heretofore mentioned, sold, their own publications at wholesale to wholesale book dealers, and to large retail dealers, and in addition thereto, and at all the times heretofore mentioned conducted, and still do conduct, large retail stores wherein they sell not only their own publications, copyrighted and not copyrighted, at retail, but also all publications, copyrighted and not copyrighted, of all other publishers, and that by preventing competition in the sale and supply and maintaining the prices of books at retail, as hereinbefore set forth, the complainants and all other publishers, members of the said American Publishers' Association, have and do now secure an unreasonable and extortionate advantage and profit to themselves and to each other, both in the wholesale and retail prices of books dealt in by them.

14. That the defendants are not now and never have been members of either of said associations or parties to any of the unlawful agreements hereinbefore set forth, nor have they at any time agreed to abide by any of the rules of either of said associations. And these defendants further say that shortly after May, 1901, the complainants herein, under and pursuant to the rules of the said American Publishers' Association and the said American Booksellers' Association, refused to deal with these defendants in their books, copyrighted and non-copyrighted, and warned all wholesale and other dealers from selling books published or dealt in by complainant to these defendants for the reason, as these defendants are informed and believe, that these defendants refused to maintain and sell at the arbitrary fixed price established a copyrighted book of another publisher and member of said Publishers'
Association, to wit: of Funk & Wagnalls Company, and that
139 at the time that the complainants herein so refused to deal with the defendants or permit others to deal with them in their copyrighted or non-copyrighted books, these defendants had not sold any copyrighted books published by the complainants under the rules and regulations of the said American Publishers' Association at all at any price. And these defendants further allege that the complainants herein have brought this action ostensibly in their own behalf, but really as a part and parcel of the plan of the American Publishers' Association and its members to enforce and establish the arbitrary rules adopted by it and its members, including the complainants, and by the American Booksellers' Association and its members, and that this action has been brought and is being prosecuted for the benefit of all the members of the said American Publishers' Association and the said American Booksellers' Association and the said two associations, and not for the purpose of protecting any rights secured to the complainants by any copyright alleged by them.

Wherefore, these defendants pray that they may be hence dismissed and that they may have and recover of the complainants the

costs and expenses of this suit in that behalf most wrongfully sustained.

R. H. MACY & CO.,
By ISIDOR STRAUS.
ISIDOR STRAUS.
NATHAN STRAUS,
By ISIDOR STRAUS, *Att'y.*
SPIEGELBERG & WISE,
Solicitors for Defendants, 19 William Street, N. Y. City.

J. G. CARLISLE,
EDMOND E. WISE,
Of Counsel.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Isidor Straus, being duly affirmed, says that he is a member of the firm of R. H. Macy and Company, and one of the defendants in the above-entitled action. That he has read the foregoing
140 answer and is acquainted with the facts therein stated, that said answer and the matters therein stated are true to the knowledge of deponent, except as to those matters stated on information and belief and as to those matters he believes it to be true.

ISIDOR STRAUS.

Affirmed to before me this 20th day of February, 1904.
[SEAL.] ALEX. L. STROUSE,
Notary Public, New York County.

Endorsed: U. S. Circuit Court, filed Feb. 23, 1904. Southern District New York. John A. Shields, Clerk.

Order Striking Out Parts of Answer.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Room in the Borough of Manhattan, in the City of New York, on the 28th day of April, in the year of our Lord one thousand nine hundred and four.

Present: The Hon. E. Henry Lacombe, Circuit Judge.

CHARLES SCRIBNER ET AL., Complainants,
against
ISIDOR STRAUS ET AL., Defendants.

The defendants herein having been duly served with a *subpœna ad respondendum* commanding them to appear and answer the bill of complaint of the complainants herein filed in the office of the Clerk of this court on the 10th day of November, 1903, and
141 the defendants aforesaid having thereafter duly appeared herein, and filed their answer to the said bill of complaint

in the office of the aforesaid clerk on the 23rd day of February, 1904, and the complainants having thereupon on the 22nd day of March, 1904, duly filed in the office of the Clerk aforesaid their certain exceptions to the answer of the defendants and the said exceptions having duly come on to be heard at a Stated Term of this court for the hearing of motions held in and for the Southern District of New York on the 16th day of April, 1904, now, after hearing Stephen H. Olin, Esq., of counsel for the complainants, in support of said exceptions, and John G. Carlisle, Esq., of counsel for the defendants, in opposition thereto, and due deliberation having been had, it is

Ordered that the exceptions of the complainants to the answer of the defendants herein be and the same hereby are sustained and that Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the "further answer and defense" of the defendants herein be and the same hereby are stricken out as impertinent.

E. H. LACOMBE,
U. S. Circuit Judge.

Endorsed: U. S. Circuit Court. Filed Apr. 28, 1904. Southern District New York. John A. Shields, Clerk.

142 Circuit Court of the United States, Southern District of New York.

In Equity. No. 8583.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons,

v.

ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy and Company.

In Equity. No. 8936.

CHARLES SCRIBNER'S SONS, Incorporated,

v.

ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy and Company.

Suits in equity to restrain defendants from infringing complainants' copyrights for books by selling copyrighted books at retail, without a license from complainants, at a lower price than fixed and not maintaining retail prices as provided by the regulations of the American Publishers' Association. Also to restrain defendants from contributory infringement of such copyrights by inducing wholesale dealers and jobbers in such books to violate their agreements with complainants as to the sale of copyright books.

The defendants deny infringement in any sense. Deny
143 that complainants have proved a cause of action. Allege that complainants parted with title to all books the defendants

have purchased and sold, and that, being their property, they had the right to sell them at such price as they saw fit to fix.

STEPHEN H. OLIN, AND
OLIN, CLARK & PHELPS,
For Complainants.

SPIEGELBERG & WISE,
With JOHN G. CARLISLE AND
EDMOND E. WISE,
Of Counsel,
For Defendants.

RAY, *District Judge:*

In the first action, No. 8583, the alleged limitation on the right to sell books at retail at less than a fixed price expired before the final hearing, hence no injunction, only an accounting could be granted in that case. The parties to that suit all reside in the State of New York. There is no diversity of citizenship.

In the second suit, No. 8936, the limited time had not expired and, as defendants had incorporated under the laws of New Jersey before bringing the action, there exists in such action diversity of citizenship.

If there is no infringement of a copyrght shown in such first action, No. 8583, it must be dismissed. In the second action, if defendants are violating complainant's rights and a cause of action is shown and the amount involved is sufficient, the action may be sustained, even if infringement of a copyright is not shown. In this action the complainants not only allege infringement of their copyrights, but allege that they have valid contracts for the sale of their copyrighted books with certain parties which are or were
144 being carried out by them and that defendants, wrongfully, etc., have induced and are inducing such parties to violate such contracts by false representations and other acts to the great injury of the complainants' business. They set forth certain facts tending to show grounds for equitable relief and an injunction.

The complainant is the owner of a large number of copyrights and is a publisher. It publishes and puts on the market its copyrighted books, but asserts that it puts them on the market under certain limitations and restrictions which attach to the books and the right to sell in the hands of all persons having notice of such restriction. The complainants are members of an association known as the American Publishers' Association. This association has made certain rules as to the purchase and sale by publishers and dealers of copyrighted books. These rules are attached to the complaint and set out in full in the opinion of this Court in the case of The Bobbs-Merriil Company against these same defendants, just decided, but not yet reported. In that case, while the facts were somewhat different, the questions of law involved here were extensively discussed.

Paragraph three of those rules provides as follows:

"That the Members of the Association agree that such net copyrighted books, and all others of their books, shall be sold by them to those booksellers only who will maintain the retail price of such net

copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the Association as one who cuts such prices, or who fails to abide by
145 such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided."

The complainants in their attempt to live up to these rules of this association, and to enforce them against others, and these defendants, and to maintain the fixed retail price of books sold in the retail trade, and to exclude from the business of selling their publications or the publications of any other publisher of books (copyrighted publications), those who will not observe such rules, have fixed the retail price of their copyrighted books and adopted the following method of selling, viz.: for stock orders a salesman in most instances goes to a dealer and takes his order, or the dealer orders by mail, or, if a New York City dealer is purchasing he sends a messenger. As to notifying dealers, purchasers, of the rules as to net prices and discount on fiction, fixed by the rules of such association, the complainants print a notice on their catalogues and on their billheads, reading as follows—on catalogues:

"Charles Scribner's Sons' Catalogue of Publications.

All Books sent Postpaid except where Postage is Indicated.

Note to the Trade:

Copyrighted Net books published after May 1st, 1901, and copyrighted fiction published after February 1st, 1902, are sold on condition that prices be maintained, as provided by the Regulations of The American Publishers' Association. On such books the month of publication is given, except where the book is announced as In Press.

Books starred are mostly Educational and are subject to a slightly different discount to the Trade than other Net Books."

146 On billheads:

"All claims for Allowance must be made within five days after receipt of Goods—Not Responsible for Books ordered sent by Mail, or sent out to be Packed.

153-157 Fifth Avenue, Between 21st and 22nd Streets.

NEW YORK, —— —, 190–.

M—— ——

Folio ——

Bought of Charles Scribner's Sons, Publishers, Importers and Booksellers.

Terms:—Net Cash. Payable with Exchange on New York.
Sent per ——.

Copyrighted Net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on con-

dition that prices be maintained as provided by the regulations of the American Publishers' Association.

In Complainants' evidence we find this *in* this subject: Q. "Is any other method to be taken to bring the rules of the association to the notice of purchasers in the wholesale department?" A. "Not by Charles Scribner's Sons." As to new customers the witness says: Q. "When a new firm comes to deal with Charles Scribner's Sons that is unknown to you, what do you do?" A. "We get what information we can as to their standing and whether or not they will be willing to maintain the rules of the association by referring the matter to the association for investigation, or sometimes by
147 sending them this blank which has been presented." Q. "Can you say whether or not these rules are, in one way or another, brought to the attention of every purchaser from the wholesale department?" A. "No, sir." Q. "They are not brought to their notice?" A. "Except in the way I have described, by the billheads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases." Q. "Have any sales been made by Charles Scribner's Sons since the adoption of those rules in their wholesale department except subject to those rules?" A. "No, sir." Q. "They are not brought to their notice?" A. "Except in the way I have described, by the billheads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases."

It is conceded that defendants knew of the rules and of the custom of the complainants. Defendants did not purchase any books of complainants. They had a purchasing agent who purchased them where they could get them, paying therefor in cash.

In the Bobbs-Merrill case, just decided and above referred to, this Court has held, following the Circuit Court of Appeals in the Second Circuit, in Harrison *v.* Maynard, Merrill & Co., 26 U. S. App. 99; 61 Fed. Rep., 689, that so long as the publisher of a copyrighted book (such publisher owning the copyright) retains the title to the copies which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and the person to whom the copies can be sold. If agents or licensees, intrusted with the possession of such books, not having title, violate their instructions and sell to a person who has knowledge of the restricted power, such sale of such copyrighted book is an infringement and may be restrained. This right results
148 from the fact that the owner of the copyright and copyrighted book has not parted with the title to the book or to the copyright. The right to restrain the sale is gone, however, when the owner of the copyright and of the copy or copies in question parts with his title to such copy or copies and confers an absolute title on the purchaser, even if such sale be accompanied with an agreement for a restricted use, or for a sale at a fixed price.

We come then, in these cases, to the question whether the complainants in either case retained title to the books, or any of them, that passed to the possession of the defendants and which they have

been and are engaged in selling. It seems clear that they did not. They conferred no conditional or defeasible title, but an absolute title. Some books the defendants purchased direct of the complainants at retail and paid the full retail price. They sold the same at retail at a loss. This they had the right to do. They were the absolute owners. The others were purchased of dealers who had purchased of the complainants and paid the full price demanded. There was no notice on each book and it does not appear that these dealers had seen the catalogues, or that they had a bill of sale containing the notice. But, however, this may be, the notice does not retain the title, or restrict or limit the title conveyed. If so, the complainants could have replevied the books when they found they were being sold in violation of instructions given their licensees intrusted with the books. It may be, and it may not be, that the dealers from whom the defendants took title knew of the conditions of the notice when they purchased of the complainants. If they did they impliedly agreed that in selling the books which they then purchased of complainants they would maintain prices. If so, the relation was contractual, and the remedy of complainants is
149 for a breach of that contract if they can find the person or firm who violated it. The notice is not a license agreement, as in the Neostyle case, recently decided by this Court, and others there cited. (Cortelyou *et al. vs.* Charles Eneu Johnson Co.) Reference is made to the opinion of this Court in the Bobbs-Merrill case for a full statement of the law. In this case the notice does not purport to restrict title, or create an agency, or establish a license agreement.

There is no evidence that will justify a finding that defendants have unlawfully or improperly induced any person to violate their contract, if any, with complainants.

In each case the defendants are entitled to a decree dismissing the complaint, with costs.

(Endorsed:) United States Circuit Court, Southern District of New York.—Charles Scribner *et al. v.* Isidor Straus *et al.*—No. 8583.—Charles Scribner's Sons, Incorporated, *v.* Isidor Straus *et al.*—No. 8936.—Opinion, Geo. W. Ray, U. S. Judge.—U. S. Circuit Court, Southern District New York.—Filed Jul. 11, 1905.—John A. Shields, Clerk.

150 United States Circuit Court, Southern District of New York.

In Equity. No. 8583.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants,
against
ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy and Company, Defendants.

This cause having come on to be heard on the 17th day of January, 1905, upon the pleadings and proof, and Stephen H. Olin, Esq., having been heard on the part of the complainants, and Hon. John G. Carlisle and Edmond E. Wise, Esq., having been heard on the part of the defendants, and due deliberation having been had, it is

Ordered, adjudged and decreed, that the bill of complaint herein be and the same hereby is dismissed, with costs to defendants to be taxed.

Aug. 11, 1905.

GEO. W. RAY, *U. S. Judge.*

(Endorsed:) U. S. Circuit Court, Southern District of New York.—Charles Scribner and ano. *vs.* Isidor Straus and ano.—Decree.—Spiegelberg & Wise, Solicitors for Defendant, 19 William Street, New York.—U. S. Circuit Court, Southern District of New York.—Filed Aug. 12, 1905.—John A. Shields, Clerk.

151 United States Circuit Court, Southern District of New York.

In Equity. 8583.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,
against
ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City and State Aforesaid, Having a Regular and Established Place of Business in the Said Borough of Manhatton, Individually and as Co-partners, Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

To the Honorable the United States Circuit Court of Appeals for the Second Circuit:

The appeal of the above-named Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons, complainants and appellants, respectfully showeth:

That on the 10th day of November, 1903, your petitioners filed their bill in the Circuit Court of the United States for the Southern District of New York against the above-named defendants and respondents, praying that the said defendants be enjoined and re-

strained from certain unlawful acts and practices set forth in the said bill of complaint, and that they might be decreed to account
152 for and pay over the income and profits by their aforesaid unlawful acts derived in violation of the complainants' rights, and might be perpetually enjoined and restrained from any further publication, sale, circulation or distribution in any manner of certain books known and described as

"Vacation Days in Greece."
"In the Grip of the Mullah."
"Colonel Carter's Christmas."
"The Little Shephard of Kingdom Come."
"Gordon Keith."
"The Vagabond."
"Our Feathered Game."
"The Meaning of Pictures."
"The Better Sort."
"The Turquoise Cup and the Desert."
"Horses Nine."
"The Principles of Money."
"The House on the Hudson."
"No Hero."
"Our Northern Shrubs."
"Middle Aged Love Stories."
"Trees, Shrubs and Vines."
"The Modern Obstacle."
"Letters of a Diplomat's Wife."
"The Under Dog."
"A Dictor of Philosophy."
"In the African Forest and Jungle."
"The Blood Lilies."
"The Weaker Sex."
"Reminiscences of the Civil War."
"With the Allies to Pekin."
"Through Three Campaigns."
"My Wonderful Visit."
"Old London Silver."
"Odd Craft."
"The Development of the Drama."
"The Daughter of a Magnate."
"Sanctuary."
153 "In the War with Mexico."
"Foes of the Red Cockade."
"Poems."

That the said defendants and each of them might be enjoined and restrained from obtaining the said books or either of them from jobbers and booksellers to whom they have been or might have been or may be transferred from the complainants by conditional sale in violation of such condition; and for an accounting and injunction pending the final determination of the suit, and for such other relief as might be just and proper.

That on or about the 23d day of February, 1904, the said de-

fendants and respondents filed their joint answer denying the averments in said bill contained and interposing a further answer and defense, and praying that it be dismissed, with costs.

That on the 22d day of March, 1904, the complainants filed their exceptions to that part of the said answer which constituted a further answer and defense; that by an order made at a stated term of the Supreme Court of the United States for the Southern District of New York, Hon. E. Henry Lacombe, Circuit Judge, presiding, which order was filed upon the 28th day of April, 1904, the said exceptions of the complainants were sustained and the said further answer and defense of the defendants was stricken out as impertinent.

That on the 29th day of July, 1904, the complainants filed their replication denying the averments of said answer of the defendants; that thereafter the complainants and the defendants took their respective proofs to final hearing under the 67th Rule of the Supreme Court as amended, and that thereafter and on or about the 17th day of January, 1905, a final hearing was had in open court before the Hon. George W. Ray, Judge; that on or about the 12th day of August, 1905, a final decree was made and pronounced in
154 the cause, wherein it was in substance adjudged and decreed that the bill of complaint be dismissed, with costs.

Wherefore, these appellants appeal from the whole of said decree of the said Circuit Court of the United States and respectfully pray that the said decree of said Circuit Court, and the bill of complaint, answer, replication and transcripts, and all the pleadings, depositions, evidence, exhibits, proofs and proceedings in the said cause may be sent to the United States Circuit Court of Appeals for the Second Circuit without delay, and that the said United States Circuit Court of Appeals for the Second Circuit will proceed to hear the said cause anew, and that the said decree dismissing the said bill of complaint and every part thereof may be reversed, and a decree made by the United States Circuit Court of Appeals for the Second Circuit that these complainants and appellants are entitled to the relief prayed for in the said bill of complaint, and that the cause may be remanded to said Circuit Court for final trial and hearing, and for costs against said defendants and appellees in favor of these complainants and appellants, in this Court and in the said Circuit Court, and for such other decree as to the United States Circuit Court of Appeals for the Second Circuit may seem just.

STEPHEN H. OLIN,
Solicitor for Appellants.

STEPHEN H. OLIN,
Of Counsel.

The foregoing appeal is hereby allowed.
New York, Sept. 5th, 1905.
(Signed) E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York.—Charles Scribner and another, &c., Compl'ts &
155 Appel'ts, against Isidor Straus and another, Def'ts & Resp'ts.—Appeal.—S. H. Olin, Solicitor for Compl'ts & Appel'ts, 32 Nassau Street, New York City.—Service of a copy of the within Appeal and notice is hereby admitted. Dated Sept. 6, 1905.—Spiegelberg & Wise, Solicitors for Def'ts & Resp'ts.—U. S. Circuit Court, Southern District of New York.—Filed Sep. 6, 1905.—John A. Shields, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,

against

ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City, and State Aforesaid, Having a Regular and Established Place of Business in the said Borough of Manhattan, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

The complainants above named, by Stephen H. Olin, their
156 solicitor, and in connection with their appeal from the decree herein of the Circuit Court of the United States for the Southern District of New York dismissing the complainants' bill of complaint, make and file the following assignment of errors:

I. That Hon. George W. Ray, the Judge presiding at the trial of the said case, dismissed the complainants' bill of complaint, and did not sustain said bill and decree the accounting therein prayed for.

II. That the said Judge did not find and decide that the complainants are the legal owners of the copyrights of the books described in the complaint and are entitled to the full benefit of the copyright laws thereunder.

III. That the said Judge did not find and decide that all sales by the complainants of copyright books published by them as in said bill set forth (except only such sales as were made at retail for the full "net price") were conditional or restricted sales, upon the lawful condition that the purchaser should take and hold the same subject to the rules of the American Publishers' Association, as in said bill set forth, and that prices thereof be maintained as provided in said rules.

IV. That said Judge did not find and decide that all purchasers of said copyrighted books (except purchasers at retail at net prices) had at the time of their respective purchases full and complete notice of the said conditions and restrictions, and that thereby the complainants became and are entitled to the full performance of said conditions by all such purchasers under the protection of the copyrights mentioned in said bill, and that the complainants
157 are vested by the said copyrights and by virtue of the said conditional sales with the right to the fulfillment and per-

formance of said conditions and restrictions, and of the said agreement on the part of the jobbers and dealers, including the defendants, to whom said books have been transferred by said conditional sales, and also to immunity against interference from any one, including the defendants, with respect to the said conditions, and that none of the said purchasers can lawfully sell the said books so conditionally transferred to them except by complying with the conditions of such transfer.

V. That the said Judge did not find that the sales by defendants of copies of the said books were without the complainants' consent or permission, and that all such sales were in violation of the complainants' rights secured under the copyright acts of the United States.

VI. That said Judge did not find and decide that the defendants induced and persuaded sundry jobbers an- dealers who were possessed of copies of the said books to deliver the same to the defendants for sale at retail at less than the net retail prices fixed by the complainants for such books, respectively, and that said acts of the defendants were in violation of the agreement, conditions and restrictions aforesaid, as set forth in the said bill.

VII. That the said Judge did not find and decide that the defendants induced certain jobbers and dealers to break their contracts with complainants and thereby induce other persons to suppose that said contracts are not valid.

VIII. That the said Judge did not find and decide that
158 the defendants acted as set forth in the said bill and that such acts were injurious to the complainants and constituted an infringement of their rights under such copyrights, and were manifestly wrong and improper.

And by reason of the aforesaid errors, the said complainants pray that the decree and judgment aforesaid may be reversed, annulled and altogether held for naught, and that the case may be remanded to the Circuit Court with direction that a decree be entered in favor of the complainants in accordance with the prayer of the bill of complaint; and that they may have such other relief as to the court may seem just.

STEPHEN H. OLAIN,
Solicitor for Appellants.

STEPHEN H. OLIN,
Of Counsel.

(Endorsed:)—United States Circuit Court of Appeals for the Second Circuit.—Charles Scribner and another, &c., Complts. and Appelts., against Isidor Straus and another, Defts. & Respts.—Assignment of Errors.—S. H. Olin, Solicitor for Complts. & Appelts., 32 Nassau Street, New York City.—U. S. Circuit Court, Southern District New York.—Filed Sep. 2, 1905.—John A. Shields, Clerk.

159 United States Circuit Court of Appeals for the Second Circuit.

In Equity. 8583.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,
against
ISIDOR STRAUS and NATHAN STRAUS, etc., Defendants and Respondents.

Know all men by these presents, that we, Charles Scribner's Sons, of No. 153 Fifth avenue, in the City, County and State of New York, and National Surety Company, having an office and place of business at No. 35 Nassau street, in the City, County and State of New York, are held and firmly bound unto the above-named Isidor Straus and Nathan Straus in the sum of four hundred ($400) dollars, to be paid to the said Isidor Straus and Nathan Straus, their executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 1st day of September, in the year of our Lord one thousand nine hundred and five.

Whereas, the above-named Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons, have appealed to the
160 Circuit Court of Appeals of the United States for the Second Circuit from a decree of the Circuit Court of the United States for the Southern District of New York, bearing date and entered the 12th day of August, 1905, in a suit in which said Charles Scribner's Sons were complainants against Isidor Straus and Nathan Straus, defendants,

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against them as such appellants therein if they shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

CHARLES SCRIBNER'S SONS, [SEAL.]
By CHARLES SCRIBNER.
NATIONAL SURETY COMPANY,
By ARTHUR P. WEST, *Res. Vice-President.*

Attest:
E. CASHION,
[SEAL.] *Res. Assist. Secretary.*

STATE OF NEW YORK, *County of New York, ss:*

On this 1st day of September, 1905, before me personally came Charles Scribner, to me personally known and known to me to be one of the partners in the firm of Charles Scribner's Sons, the com-

plainants herein; and duly acknowledged to me that he executed the foregoing instrument as the act and deed of said Charles Scribner's Sons, and for the uses and purposes therein mentioned.

[SEAL.] JONATHAN H. HOLMES,
Notary Public, New York County.

161 STATE OF NEW YORK, *County of New York, ss.:*

On this 2d day of Sept., 1905, before me personally appeared Arthur P. West, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice-President of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of New York Session Laws of 1893. And the said Arthur P. West further said that he is acquainted with E. Cashion and knows him to be the Res. A .. Secretary of said Company; that the signature of the said E. Cashion subscribed to the said instrument is in the genuine hand writing of the said E. Cashion, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Arthur P. West, Res. Vice-President.

BELLE F. JAIS,
Notary Public for the County of N. Y.

Certificate filed in Kings, Westchester, Richmond and Queens Counties.

162 *Copy of By-Law.*

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII, SEC. 1. *Signatures Required.*—All bonds, recog-"nizances, contracts of indemnity and other writings obligatory in "the nature thereof, shall be signed by the President, the Vice-"President, the Second Vice-President, a Resident Vice-President, "or an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the company affixed thereto, duly at-"tested by the Secretary, an Assistant Secretary or a Resident Assist-"ant Secretary. The Vice-President, Second Vice-President and "Resident Vice-Presidents shall each have authority to sign such "instruments whether the President be absent or incapacitated or "not; and the Assistant Secretaries and Resident Assistant Secre-

"taries shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York*, ss:

I, E. Cashion, Res. Asst. Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said company, and do certify that the same is a correct and true transcript there-
163 from, and of the whole of said original By-Law.

Given under my hand and seal of the company this 2d day of Sept., 1905.

[L. S.]

E. CASHION,
Res. Asst. Secretary.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Charles Scribner and another, &c., Complts. & Appelts., against Isidor Straus and another, Defts. & Respts.—Supersedeas Bond.—S. H. Olin, Solicitor for Complts. & Appelts., 32 Nassau Street, New York City.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Defts. of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York.—Filed Sep. 6, 1905.—John A. Shields, Clerk.

By the Honorable —— ——, one of the Justices of the United States Circuit Court of Appeals for the Second Circuit, to Isidor Straus and Nathan Straus:

Whereas, Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons, have lately appealed to the United States Circuit Court of Appeals for the Second Circuit from a decree lately rendered in the Circuit Court of the United States for the Southern District of New York, made in favor of you, the said Isidor
164 Straus and Nathan Straus, and have filed the security required by law; you are therefore to appear before the said United States Circuit Court of Appeals for the Southern District of New York at the City of New York on the 2d day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the Borough of Manhattan in the City of New York, in the Southern District of New York in the Second Circuit, the 5th day of September, in the year of our Lord one thousand nine hundred and five.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Charles Scribner and another, &c., Complts. & Appelts., against Isidor Straus and another, Defts. & Respts.—Citation.—S. H. Olin, Solicitor for Complts. & Appelts., 32 Nassau Street, New York City.—Service of a copy of the within Citation and notice is hereby admitted. Dated Sept. 6th, 1905. Spiegelberg & Wise, Solicitors for Defts. & Respts.—*U. S. Circuit Court, Southern District New* York.—Filed Sep. 6, 1905.—John A. Shields, Clerk.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to 164, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled
165 Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons, Complts.-Appellants, against Isidor Straus and Nathan Straus, Defts.-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of September, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and thirtieth.

[L. S.] JOHN A. SHIELDS, *Clerk.*

166 United States Circuit Court of Appeals for the Second Circuit.

Nos. 185 and 186, October Term, 1905.

Argued April 3, 1906, Decided June 16, 1906.

CHARLES SCRIBNER and ARTHUR SCRIBNER, Trading as Charles Scribner's Sons, Complainants-Appellants,

vs.

ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy & Company, Defendants-Appellees.

CHARLES SCRIBNER'S SONS, Incorporated, Complainants-Appellants,

vs.

THE SAME, Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend, and Coxe.

These causes come here upon appeals from decrees of the United States Circuit Court for the Southern District of New York, dismissing bills alleging infringement of copyright.

TOWNSEND, *Circuit Judge:*

The facts herein are as follows:

The complainants, under the firm name of Charles Scribner's Sons, are publishers and sellers of books. The defendants are
167 partners under the firm name of R. H. Macy & Company, and are carrying on the business of a department store, wherein they sell at retail only, books, copyrighted and uncopyrighted.

About the year 1901, certain publishers of copyrighted books formed an association, known as The American Publishers' Association, and, in pursuance of a "plan to correct some of the evils connected with the cutting of prices on copyrighted books," its members agreed, *inter alia*, as follows:

"III. That the members of the Association agree that such net copyrighted books and all others of their books, shall be sold by them to those booksellers only, who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the Association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations, as may be established by local associations as hereinafter provided."

Defendants refused to enter said Association or to abide by any of its rules, and sold books at prices less than those fixed by the Association; thereupon it issued a circular, requesting all publishers and booksellers to refuse any dealing of any kind with defendants, and complainants, who were members of said Association, refused to sell any books to defendants. Thereafter, defendants bought books from other dealers, including those published by complainants, and sold them at such prices as they saw fit. Their purchases were made from people who knew that they intended to sell them at less than the prices fixed by the Association. Complainants, thereupon, brought this suit against defendants to restrain them from selling complainants' copyrighted books at prices less than those fixed by complainants, and from buying any of such books except under the rules and regulations of said Association.

168 Complainants caused to be printed at the head of their catalogues and on their invoices and bills for goods, the following notice:

"Copyrighted net books, published after May 1st, 1901, and copyrighted books published after February 1st, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association."

Complainants admitted that no other method was taken to bring the rules of the association to the notice of purchasers in the wholesale department, and that they could not say whether or not these rules were, in one way or another, brought to the attention of every purchaser from the wholesale department; but that notice was given, in case of a new purchaser, by correspondence and by sending the following blank:

"American Publishers' Association.

"—— —, 190–.

"In consideration of discount allowed on books bought from —— —— we hereby agree that for one year from date of publication we will not sell net books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1st, 1902, at a greater discount than 28 per cent. at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers' Association to any dealer known to us to cut prices of net books or of new fiction except as above provided."

Complainants admitted that if dealers were asked to sign this notice and refused to sign it, the trade was still allowed to sell to them, and would sell to them.

On the other hand, if a new member of the trade, or one about whom the trade was in doubt, made application for books,
169 the matter was referred to the Association, before sales were made, and the pledge to the Association was executed before deliveries were made.

Complainants say that the question presented is the following:

"Where the proprietor of a copyright sells copies of his copyrighted book by a conditional sale, subject to a restriction upon further sale, and to a purchaser who agrees to comply therewith, are these copies of the book released from the monopoly as against persons having notice of the restrictions?"

Upon this assumption of fact complainants argue that the same rule should be applied as in restricted sales in patent cases, namely:

" 'to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly.' National Phonograph Co. *v.* Schlegel (128 Fed., 733, 735);"

and that defendants, by inducing booksellers to break their contracts, are guilty of contributory infringement of copyright. Complainants further seek to take advantage of the rules established in cases of restricted sales of proprietary articles manufactured under secret processes.

The questions raised herein are discussed in the opinion of this court in the case of The Bobbs-Merrill Company against these defendants, decided at this term of court, — Fed., —. For the reasons therein stated, we are of the opinion that the claims arising out of the peculiar rights attached to articles made by secret processes, or the statutory rights in articles protected by patents or copyright, do not directly bear upon the questions raised herein, although the discussions in some of said cases cover the principles applicable to this case.

170 There is no statement in the printed notice or blanks of any claim of right under the copyright law. The ques-

tion of liability by reason of such notice is not one of infringement of copyright. The question is one as to the right of these complainants to relief in a court of equity, by virtue of their common law rights, independent of statutory copyright, in view of the fact that they have issued, as above, printed notices that

"Copyrighted books * * * are sold on condition that prices be maintained as provided by the regulations of The American Publishers' Association," &c.

But this question is not open to discussion in these cases as there is neither the diversity of citizenship, in the first case, nor the claim of damages in the sum of $2,000, in either case, requisite to confer jurisdiction of questions not arising out of the copyright law.

The complainants further contend that defendants have been guilty of contributory infringement of copyright because they, knowing of complainants' refusal to sell, except upon condition that the rules of the Publishers' Association should be obeyed as to resale and maintenance of prices,

"designing and contriving to benefit themselves at the expense of and to the injury of your orators, have, as your orators are informed and believe, in the Borough of Manhattan and elsewhere in the United States, induced and persuaded sundry of the jobbers and dealers who have obtained from your orators as aforesaid, books published under the above enumerated copyrights, to deliver the same books to the defendants for sale at retail at less than the net retail prices fixed by your orators for such books respectively, in violation of the agreement, conditions and restrictions upon which as aforesaid the said jobbers and dealers have obtained such books and hold the same as aforesaid; and the defendants have thus
171 induced such jobbers, booksellers and dealers to break and violate the agreement and condition as to maintaining prices and selling to no one known to cut net prices, so as aforesaid made and assumed by them."

The answer "admits, on information and belief, that the complainants have made all sales of books subject to the rules of the American Publishers' Association as set forth," but denies all the allegations as to attempts on defendants' part to induce dealers to violate the agreements, conditions and instructions on which they obtained said books.

The evidence fails to show that defendants have wrongfully induced any person to break his agreement with complainants.

The facts bearing on this contention are substantially as follows:

The defendants "have been compelled to purchase books through secret ways," and the books which they have "succeeded in buying were bought from people who knew the price for which deponent (defendant's agent) bought them, * * * and who were willing to take the risk of incurring the displeasure of the combined publishers and combined booksellers for the profits that she offered them."

In some instances members of the Association were required to

sign papers or agreements with The American Publishers' Association, but in a great many cases they were not required to sign unless they were new comers in the business, and, "generally speaking, such signature was only exacted from those traders who were new in the business;" and if purchasers were asked to sign and refused, the trade was still allowed to sell to them, and would sell to them; and apparently this pledge was to a considerable extent a mere matter of form.

172 It nowhere satisfactorily appears that defendants purchased from complainants' vendees or from anyone who made any contract to obey said rules. It does not appear that defendants may not have bought from sub-vendees or from those dealers who refused to sign the pledge as to resale, and to whom the trade was allowed to sell and did sell books.

The evidence fails to show which dealers, if any, from whom defendants purchased books, ever assented to said attempted conditions, or accepted them or agreed to abide by the terms as to retail prices. Such assent or agreement cannot be implied from mere purchases, for such books may have been lawfully sold and bought upon an express refusal to sign said pledge.

In the absence of proof of any reservation of right in the copyright by its owner, or of an agreement by the dealers from whom defendant purchased to abide by said rules, or of a wrongful attempt on the part of defendants to induce its vendors to break any contract, there can be no foundation for a claim of contributory infringement of copyright.

In these circumstances, it is unnecessary to apply to the facts proven herein the principles stated in the Bobbs-Merrill Company against these defendants, *supra*, that a violation of the restrictions attempted to be imposed upon sales of copyrighted books is not an infringement of copyright.

The decree is affirmed.

Stephen H. Olin, for the Appellants.
Edmond E. Wise and *John C. Carlisle*, for the Appellees.

173 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 26th day of June one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

CHARLES SCRIBNER and ARTHUR SCRIBNER, Trading as Charles Scribner's Sons, Complainants-Appellants,

vs.

ISIDOR STRAUSS and NATHAN STRAUSS, Trading as R. H. Macy & Company, Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.

174 Endorsed: United States Circuit Court of Appeals, Second Circuit. Scribner *vs.* Strauss. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jun- 29, 1906. William Parkin, Clerk.

175 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,

against

ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City, and State Aforesaid, Having a Regular and Established Place of Business in the said Borough of Manhattan, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

The above named complainants and appellants, Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons, feeling themselves aggrieved by the final order or decree of the United States Circuit Court of Appeals for the Second Circuit made in the above-entitled cause in equity and filed in the office of the Clerk of said Court on the 29th day of June, 1906, affirming the decree of the United States Circuit Court in and for the Southern District of New York herein filed in the office of the Clerk of said Court on the 12th day of August, 1905, dismissing the bill of complaint herein with costs, now come by Stephen H. Olin, their solicitor, and petition this Court for an order allowing said complainants-appellants to prosecute an appeal from said order or decree of this Court to
176 the Supreme Court of the United States under and according to the laws of the United States in this behalf made and pray

that this appeal may be allowed, and that a transcript of the record and proceedings upon which said order or decree was made, duly authenticated, may be transmitted by the Clerk of this Court to the Supreme Court of the United States.

Dated 10 January, 1907.

S. H. OLIN,
Solicitor for Appellants, 32 Nassau Street, Manhattan, New York City.

The foregoing appeal is hereby allowed this 11th day of January, 1907.

WM. K. TOWNSEND,
Judge of the United States Court of Appeals for the Second Circuit.

177 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner and another, Compl'ts & Appel'ts, against Isidor Straus and another, Def'ts & Resp'ts. Copy Petition of Appeal. S. H. Olin, Solicitor for Compl'ts & Appel'ts, 34 Nassau Street, Borough of Manhattan, New York City. (Mutual Life Building.) Service of a copy of the within is hereby admitted. Edmond E. Wise. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 11, 1907. William Parkin, Clerk.

178 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,
against
ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City, and State Aforesaid, Having a Regular and Established Place of Business in the said Borough of Manhattan, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

The complainants-appellants above named, by Stephen H. Olin, their solicitor, in connection with their petition of appeal to the Supreme Court of the United States filed the 11th day of January 1907 from the final order or decree of the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, in equity, filed on the 29th day of June 1906, affirming the decree of the United States Circuit Court for the Southern District of New York, herein make the following assignment of errors:

First. The Court erred in finding that the complainants admitted that no other method was taken to bring the rules of the Association to the notice of purchasers in the wholesale department, and that they could not say whether or not these rules were in one way or
179 another brought to the attention of every purchaser by the wholesale department.

Second. The Court erred in finding that complainants admitted that if dealers were asked to sign a notice and refused to sign it the trade was still allowed to sell to them, and would sell to them.

Third. The Court erred in deciding that the claims arising out of the peculiar rights attached to articles made by secret processes or statutory rights of articles protected by patents or copyright do not directly bear upon the questions raised herein.

Fourth. The Court erred in holding that the question of liability of the defendants is not one of infringement of copyright.

Fifth. The Court erred in deciding that the evidence fails to show that defendants have wrongfully induced any person to break his agreement with complainants.

Sixth. The Court erred in deciding that it nowhere satisfactorily appears that defendants purchased from the complainants' vendees or from any one who made any contract to obey said rules.

Seventh. The Court erred in deciding that books may have been lawfully sold and bought upon an express refusal to sign said pledge.

Eighth. The Court erred in holding that there was no foundation for claim of contributory infringement of copyright.

180 Ninth. The Court erred in deciding that the principles stated in Bobbs-Merrill Co. against these defendants, 147 Fed. Rep., 15, namely,—"that a violation of the restrictions attempted to be imposed upon sales of copyright books is not an infringement of copyright," are applicable to the facts proven herein.

Tenth. The Court erred in affirming the decree of the Court below dismissing the appeal of complainants.

Wherefore appellants pray that the said final order or decree herein be reversed, and for such other and further relief as may be equitable.

Dated, 11 January, 1907.

S. H. OLIN,
Solicitor for Complainants-Appellants, 32 Nassau Street, Manhattan, New York City.

W. K. T.

181 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner and another, Compl'ts & Appel'ts against Isidor Straus and another, Def'ts & Resp'ts. Copy Assignment of Errors. S. H. Olin, Solicitor for Compl'ts and Appel'ts, 34 Nassau Street, Borough of Manhattan, New York City. (Mutual Life Building.) Service of a copy of the within assignment of errors is hereby admitted. Edmond E. Wise. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 11, 1907. William Parkin, Clerk.

182 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,
against
ISIDOR STAUS and NATHAN STRAUS, etc., Defendants and Respondents.

Know all men by these presents, That the National Surety Company, a corporation organized under the laws of the State of New York, having an office and place of business at No. 62 Liberty Street, in the City, County and State of New York, is held and firmly bound unto the above named Isidor Straus and Nathan Straus in the sum of Five hundred ($500.) dollars to be paid to the said Isidor Straus and Nathan Straus, their executors, administrators or assigns, for the payment of which well and truly to be made it binds itself, its successors and assigns, jointly and severally firmly by these presents.

Sealed with its seal and dated the 10th day of January, in the year of our Lord one thousand nine hundred and seven.

Whereas the above named Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons have appealed to the Supreme Court of the United States from a final order or decree of the United States Circuit Court of Appeals for the Second Circuit filed in the office of the Clerk of said United States Circuit Court of Appeals on the 29th day of June, 1906, affirming with costs the decree of the United States Circuit Court for the Southern District of New York
183 filed in the office of the Clerk of said Court on the 12th day of August, 1905, dismissing the bill of complaint in the above entitled action.

Now, therefore, the condition of this obligation is such that if the above named appellants shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against them as such appellants therein if they shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice President.*

[SEAL.]

Attest:
JOHN HOLMES,
Res. Ass't Secretary.

184 The foregoing bond approved as to form, amount and sufficiency of surety.

WM. K. TOWNSEND,
Judge of United States Circuit Court of Appeals for the Second Circuit.

185 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK, *County of New York, ss:*

On this 10th day of January one thousand nine hundred and Seven before me personally came Joel Rathbone, known to me to be the Resident Vice President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Charles Scribner and ano. etc. *vs.* Isidor Straus and ano. etc. as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Res. Vice President, of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Charles Scribner, and ano. etc. *vs.* Isidor Straus and ano. etc. is the corporate seal of said Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Res. Vice President of said Company, and that he is acquainted with John Holmes and knows him to be the Res. Ass't Secretary of said Company; and that the signature of said John Holmes subscribed to said Bond is in the genuine handwriting of said John Holmes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million ($1,000,000.) dollars.

JOEL RATHBONE.

(Deponent's signatures.)

Sworn to, acknowledged before me, and subscribed in my presence this 10th day of January, 1907.

T.

[SEAL.] PHILIP B. INGRAHAM,
Notary Public for the County of N. Y., No. 13.

(Officer's signature, description and seal.)

Certificate filed in Kings, Westchester, Richmond & Queens Counties.

186 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner and another, Compl'ts & Appel'ts, against Isidor Straus and another, Def'ts & Resp'd'ts. Copy. Bond on Appeal. S. H. Olin, Solicitor for Compl'ts-App'l'ts, 34 Nassau Street, Borough of Manhattan, New York City. (Mutual Life Building.) United States Circuit Court of Appeals, Second Circuit. Filed Jan. 11, 1907. William Parkin, Clerk.

187 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,
against
ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City, and State Aforesaid, Having a Regular and Established Place of Business in the said Borough of Manhattan, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

STATE OF NEW YORK, *County of New York, ss:*

Charles Scribner, being duly sworn, says:

I am one of the complainants and appellants above named and am a member of the firm of Charles Scribner's Sons.

I have been actively engaged for many years in the business of printing, manufacturing, publication and sale of books and have from time to time printed, published and sold great numbers of books under the protection of the copyright law of the United States.

That the right of the complainants to maintain the retail price of the copyright books as set forth in the bill of complaint was at the time of commencing this action and now is worth over the sum of one thousand dollars.

188 That the damages sustained by the complainants as set forth in the bill of complaint exceed the sum of one thousand dollars.

CHARLES SCRIBNER.

Sworn to before me this 10th day of January, 1907.

ROBERT F. BARRETT,
[SEAL.] *Notary Public, New York County.*

189 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner and another, Compl'ts & App'l'ts, against Isidor Straus and another, Def'ts & Resp'ts. Copy. Order and Affidavit. S. H. Olin, Solicitor for Compl'ts-App'l'ts, 34 Nassau Street, Borough of Manhattan, New York City. (Mutual Life Building.) Service of a copy of the within affidavit and order is hereby admitted. Edmond E. Wise. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1907. William Parkin, Clerk. Ordered filed. Wm. K. Townsend, U. S. C. J.

190 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from — to — inclusive, contain a true and com-

plete transcript of the record and proceedings had in said Court, in the case of Charles Scribner and Arthur Scribner, against Isidor Straus and Nathan Straus as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of January, in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

191 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons, Complainants and Appellants,
against
ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City, and State Aforesaid, Having a Regular and Established Place of Business in the said Borough of Manhattan, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

By the Honorable William K. Townsend, one of the Justices of the United States Circuit Court of Appeals for the Second Circuit.

To Isidor Straus and Nathan Straus:

Whereas Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons, have lately appealed to the Supreme Court of the United States from a final order or decree of the United States Circuit Court of Appeals *from* the Second Circuit, made in favor of you, the said Isidor Straus and Nathan Straus, which final order or decree affirmed with costs the decree of the United States Circuit Court for the Southern District of New York, filed in the office of the Clerk of said Court on the 12th day of August, 1905, and have filed the security required by law,

Therefore, you are hereby cited to appear before the said
192 Supreme Court of the United States at a term thereof to be holden at Washington on the 10th day of February, 1907, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the Borough of Manhattan, City of New York, in the Second Circuit, the 11th day of January, in the year of our Lord, One thousand nine hundred and seven.

WM. K. TOWNSEND.

193 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Charles Scribner and another, Compl'ts & Appel'ts, against Isidor Straus and another, Def'ts & Resp'ts. Original. Citation. S. H. Olin, Solicitor for Compl'ts & Appel'ts, 32 Nassau Street, Borough of Manhattan, New York City. (Mutual Life Building.) Service of a copy of the within citation is hereby admitted. Dated, 11 January, 1907. Edmond E. Wise, Solicitor for Def'ts & Resp'd'ts. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1907. William Parkin, Clerk.

Endorsed on cover: File No. 20,536. U. S. circuit court of appeals, 2d circuit. Term No. 204. Charles Scribner and Arthur H. Scribner, trading as Charles Scribner's Sons, appellants, *vs.* Isidor Straus and Nathan Straus, individually and as copartners trading under the name of R. H. Macy & Company. Filed January 18th, 1907. File No. 20,536.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 205.

CHARLES SCRIBNER'S SONS, INCORPORATED,
APPELLANT,

vs.

ISIDOR STRAUS AND NATHAN STRAUS, INDIVIDUALLY AND AS COPARTNERS TRADING UNDER THE NAME OF R. H. MACY & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 16, 1907.

(20,537.)

(20,537.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 205.

CHARLES SCRIBNER'S SONS, INCORPORATED, APPELLANT,

vs.

ISIDOR STRAUS AND NATHAN STRAUS, INDIVIDUALLY AND AS COPARTNERS TRADING UNDER THE NAME OF R. H. MACY & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1907.

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a United States Circuit Court of Appeals for the Second Circuit.

CHARLES SCRIBNER'S SONS, Incorporated, Complainant-Appellant,
vs.
ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy & Company, Defendants-Appellees.

Transcript of Record.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Oct. 11, 1905. William Parkin, Clerk.

1 *Amended Bill of Complaint.*

Circuit Court of the United States for the Southern District of New York.

To the Honorables the Judges of the United States Circuit Court for the Southern District of New York:

Charles Scribner's Sons, Incorporated, a corporation duly incorporated under the laws of the State of New Jersey, and having a regular and established place of business in the City of New York, Borough of Manhattan, State of New York, brings this, its bill of complaint against Isidor Straus and Nathan Straus, residents of the Borough, City and State aforesaid, having a regular and established place of business in the said Borough of Manhattan, individually and as co-partners trading under the firm name and style of R. H. Macy & Co., Defendants—In Equity, Suit No. 2.

And thereupon your orator for *his* amended bill of complaint complains and says:

I. Your orator is a corporation duly organized and incorporated under the laws of the State of New Jersey on or about the 25th day of January, 1904, and is the immediate successor in business
2 of the co-partnership formed by Charles Scribner and Arthur H. Scribner, which did business under the firm name and style of Charles Scribner's Sons. Your orator or its said predecessors has been engaged for many years in the business of printing, manufacturing, publication and sale of books and has from time to time printed, published and sold great numbers of books under the protection of the copyright law of the United States when the same was applicable, and it has large offices, shops and stores used in such business, and large capital employed therein.

II. The defendants under their firm name or style of R. H. Macy & Co., have at all the times hereinafter mentioned carried on and

now carry on a department store at which they sell books including those copyrighted and published by your orator.

III. Prior to the year 1900 the said predecessors of your orator and other publishers were accustomed to advertise and offer for sale books at prices known as "list prices" and sellers of such books at retail sometimes disposed of such books at such list prices and sometimes allowed discounts and rebates from the list prices which discounts and rebates were not known to all and varied with different customers and purchasers.

IV. This system of selling books was unsatisfactory as well to the purchasing public as to the retail dealer and the jobber in its lack of uniformity and certainty and was injurious to the book trade, and, therefore, the said predecessors of your orator and certain other publishers in the year 1900 formed an association for the benefit of the book trade, which was duly incorporated under the laws of the State of New York, under the name of the American Publishers' Association. The said Association has not attempted to fix and had no authority to fix the prices which the members of the Association shall charge for the books published by them, and has not in any way attempted to limit and has no authority to limit the supply of books to the public.

Such Association has not attempted to limit and has no authority to limit the supply of books by its members to all jobbers and
3 booksellers who will comply with the rules of the Association, and the members of the Association have dealt and are dealing indiscriminately with all jobbers and dealers who comply with the rules of the Association.

And the members of the Association continue to carry on business in unrestrained competition with each other and with other publishers, both as to the prices and quantities of books published by them respectively.

V. The said American Publishers' Association has made certain rules for the protection of the purchasing public, intended to provide that all purchasers of books at retail (except public libraries) shall be able to buy copyrighted books at the same price without secret or other discounts or rebates. A copy of the said rules adopted by the said Publishers' Association on or about February 13, 1901 (as amended by resolutions adopted January 8, 1902, and May 27, 1902, and subsequently to April 1, 1904), is hereto annexed as a part of this bill, marked "Exhibit A."

VI. From and after the adoption of the said rules the predecessors of your orator and your orator have at all times refused and your orator now refuses to sell without restriction any of the copyright books published by them and affected by the said rules, except such of said books as have been sold by your orator or its predecessors at retail for the full "net prices," fixed for such books respectively. Excepting the sales so made at retail for the full net price, your orator has sold none of the copyright books so, as aforesaid, published by it, including the copyright books hereinafter particularly specified, except upon the condition and with the restriction that the purchaser of such books should take and hold the same subject to

the said rules of the American Publishers' Association, and your orator has sold copyright books published by it to those booksellers only who would maintain the retail net price of such net copyrighted books fixed by your orator, for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name should be given to them by the said American Publishers' Association, as one who cuts such net
4 prices, and who would not sell copyrighted works of fiction (not net) published after February 1, 1902, within a year of publication at retail at a discount exceeding 28 per cent. from the price fixed by the publishers. And your orator says that except for the above mentioned sales by them at retail at net prices they have not sold any of their said net copyrighted books and copyrighted books of fiction published after February 1, 1902 (including those hereinafter specified), by an unrestricted sale, and that they have sold such books only to jobbers and dealers on condition that prices be maintained as provided by the regulations of the American Publishers' Association.

VII. And your orator has published at the head of each catalogue and price list of books issued by them, and upon each and every bill of goods and invoice given upon sales of books the following notice:

"Copyrighted net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association."

VIII. That your orator heretofore, and on or about the dates mentioned, took out certain copyrights, as herein more specifically stated.

1. Before the nineteenth day of May, 1904, one Thomas Nelson Page wrote and composed a book, which was entitled "Bred in the Bone." That on or about the nineteenth day of May, 1904, your orator being thereto authorized by agreement with the said author, and being the sole and exclusive proprietor and holder of said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked
5 VIII-1, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orator prays may be taken as a part of this, *their* bill.

Your orator further says that on or about the nineteenth day of May, 1904, at the City of New York, within the United States aforesaid, and before the publication of said book, your orator deposited in the mail, addressed to the Librarian of Congress

at Washington, in the District of Columbia, two copies of the said book, "Bred in the Bone," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, marked VIII-1, which paper your orator prays may be taken as a part of this bill. Said two copies of the said book, so as aforesaid, deposited in the mail, were printed from type set within the limits of the United States, and your orator gave information and notice of copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1904, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orator; and your orator shows that in and by the aforesaid deposit it had intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now holds and possesses, by virtue of the acts of Congress relating to copyright, the sole and exclusive right and liberty to print, publish and vend the said book.

Your orator further shows that the said book was a work of fiction, issued at the price of one dollar and fifty cents, and by the above mentioned rules of the American Publishers' Association could not be lawfully sold for less than one dollar and eight cents.

2. Before the thirtieth day of September, 1904, one John Fox, Jr., wrote and composed a book entitled, "Christmas Eve on Lonesome and other Stories." On or about the thirtieth day of September, 1904, your orator, under an agreement with the author, being the sole and exclusive proprietor and holder of the said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said
6 book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title, as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book; that the paper hereto annexed, marked VIII-2 is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orator prays may be taken as a part of this bill.

Your orator further says that on or about the thirtieth day of September, 1904, at the City of New York aforesaid, within the United States aforesaid, and before the publication of said book, your orator deposited in the mail, addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said book, "Christmas Eve on Lonesome and other Stories," for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for the said two copies is hereto attached, which paper your orator prays may be taken as a part of this bill; that said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orator gave information and notice of copyright of said book by inserting in the several copies of every edition published,

on the title page thereof, or on the page immediately following, the following words: "Copyright, 1904, by Charles Scribner's Sons," complying with all the provisions of the said acts of Congress necessary to secure the benefit of copyright to your orator; and your orator shows that in and by the aforesaid deposit it intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now holds and possesses, by virtue of the acts of Congress relating to copyright aforesaid, the sole and exclusive right and liberty to print, publish and vend the said book.

Your orator further shows that the said book was a work of fiction, issued at the price of one dollar and fifty cents, and by the above mentioned rules of the American Publishers' Association could not be lawfully sold for less than one dollar and eight cents.

Before the thirtieth day of September, 1904, one Carolyn Wells wrote and composed a book entitled, "A Parody Anthology," and on or about the thirtieth day of September, 1904, your orator,
7 under an agreement with the said author, being the sole and exclusive proprietor and holder of the said book (said book never having been published), took out a copyright therefor in the United States, by depositing a printed copy of the title of said book in the office of the Librarian of Congress, and in all respects complied with the provisions of the existing acts of Congress relating to copyright, and received from said Librarian, who then and there recorded said title, as required by the said acts, a certificate and record in the form required by said acts, containing the title of said book. The paper hereto annexed marked VIII-3, is a true copy of such certificate and record, and of the record duly made by the said Librarian in that behalf, which said paper your orator prays may be taken as a part of this *their* bill

Your orator further says that on or about the thirtieth day of September, 1904, at the City of New York aforesaid, within the United States aforesaid, and before the publication of said book your orator deposited in the mail addressed to the Librarian of Congress, at Washington, in the District of Columbia, two copies of the said "A Parody Anthology" for the purpose of effecting copyright of the same. A copy of the receipt of the Librarian for said two copies is hereto attached, which your orator prays may be taken as a part of this bill. The said two copies of the said book, so as aforesaid deposited in the mail, were printed from type set within the limits of the United States, and your orator gave information and notice of the copyright of said book by inserting in the several copies of every edition published, on the title page thereof, or on the page immediately following, the following words: "Copyright, 1904, by Charles Scribner's Sons," complying with all the provisions of said acts of Congress necessary to secure the benefit of copyright to your orator. And your orator shows that in and by the aforesaid deposit it intended to obtain, hold and possess, and did thereby obtain, hold and possess, and now holds and possesses, by virtue of the acts of Congress relating to copyright aforesaid, the sole and exclusive right and liberty to print, publish and vend the said book. Your orator further shows that the said book was published as a "net book" under

the rules of the American Publishers' Association to be sold at the net price of one dollar and twenty-five cents.

8 IX. That except sales made by your orator at retail for net prices all sales of the said copyright books, to wit: "Bred in the Bone," "Christmas Eve on Lonesome and Other Stories" and "A Parody Anthology" have been restricted sales made as aforesaid subject to the said regulations of the American Publishers' Association and to such booksellers only who would maintain the retail net prices as provided by the said regulations and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such retail price, or whose name should be given to them by the Association as one who cuts such net prices; and your orator has at all times refused to sell to any one any of the above enumerated copyright books without restriction except such as your orator has sold, at retail at "net" prices as above set forth. All others of the above enumerated copyright books which have been sold by your orators have been sold by *them* on the conditions and subject to the restrictions and upon the agreement as to sale at retail prices hereinbefore set forth, and not otherwise, and every purchaser of such books from your orator (except purchasers at retail at net prices) had at the time of purchase from your orator and has since had full and complete notice of the conditions upon which the said books were so sold; and has accepted the same under the said conditions and has always been bound to fulfill the terms thereof. That by virtue of the conditional sales of the said books published under the copyrights above enumerated as above set forth, your orator became and still is entitled to the full performance of the said conditions by all jobbers and dealers to whom such conditional sales had been made under the protection of the said copyrights, and that your orator is as against all men vested by the said copyrights, and by virtue of the said conditional sales with the right to the quiet fulfillment and performances of the said condition and of the said agreement made and entered into on the part of the jobbers and dealers to whom the said books were transferred by such conditional sales, and also to immunity against interference from any one with respect to the said condition, and that none of the aforesaid jobbers and dealers can lawfully sell the

9 said books so conditionally transferred to them except by complying with the conditions of such transfer.

X. That, nevertheless, the defendants, well knowing the premises and well knowing the rules and regulations of the American Publishers' Association, and well knowing that your orator has at all times refused to sell any of the books published under the copyrights hereinbefore enumerated, except either at retail for the full list prices thereof or else not unconditionally, but only upon the conditions and with the restrictions hereinbefore mentioned as to resale and on condition that prices be maintained as provided by the regulations of the American Publishers' Association, and well knowing the several net prices fixed by your orator for the sale at retail of the books published by your orator under the above enumerated copyrights, but designing and contriving to benefit themselves at the

expense and to the injury of your orator, have, as your orator is informed and believes, in the Borough of Manhattan, City of New York, published and sold and exposed for sale copies of the books published under the protection of the said copyrights without your orator's consent or permission and in violation of your orator's sole right and liberty secured under the Copyright Act as aforesaid and have sold and offered for sale at retail such books for less than the net prices fixed by your orator for the sale thereof pursuant to the regulations of the American Publishers' Association, and also that the defendants, with full knowledge of the premises as aforesaid, in disregard of the sole right of your orator under the Copyright Act, designing and contriving to benefit themselves at the expense of and to the injury of your orator have, as your orator is informed and believes, in the Borough of Manhattan and elsewhere in the United States, induced and persuaded sundry of the jobbers and dealers who have obtained from your orator as aforesaid, books published under the above enumerated copyrights, to deliver the same books to the defendants for sale at retail at less than the net retail prices fixed by your orator for such books, respectively, in violation of the agreement, conditions and restrictions upon which as aforesaid the said jobbers and dealers have obtained such books and *h*old the same as aforesaid; and the defendants have thus induced such jobbers, booksellers and dealers to break and violate the agreement and condition as to maintaining prices and selling to no one known to cut net prices, so as aforesaid made and assumed by them.

By reason of such malicious acts and interference by the defendants, your orator has been and is irreparably injured in its lawful trade and business and hitherto has been without sufficient and adequate redress for the wrongs and injuries which it has sustained and now suffers at the hands of the said defendants.

The defendants persist and threaten to continue in their unlawful practices, rendering your orator subject to the danger of irreparable damage to come.

XI. That the defendants by inducing certain jobbers and dealers to break their contracts with your orator induce others to suppose that the said contracts are not valid, and by selling your orator's copyright books against the will of your orator, and at less than the prices at which they are sold by other retail dealers, bring confusion into the trade and undersell the booksellers, who lawfully sell the said books, and thereby injure your orator's said trade and business. The number of books published under the copyrights above enumerated amounts to many thousands, and even if it were well known to your orator (as it is not) what jobbers and dealers have violated the conditions of purchase and sale, to obtain redress from all delinquent jobbers and dealers would involve a multiplicity of suits in many jurisdictions, in each of which the damage obtained would be less than the expense of bringing and maintaining the suit. Wherefore your orator is remediless by way of damages and unless these defendants, who corrupt the jobbers and dealers aforesaid, and cause them to break their agreements with your orator, can be enjoined and re-

strained from their acts and practices aforesaid for which no adequate compensation can be given at common law or by damages.

XII. Heretofore and on or about the 10th day of November, 1903, your orator's predecessors in business, Charles Scribner and Arthur H. Scribner, individually, and as copartners under the firm name and style of Charles Scribner's Sons, filed in the office
11 of the Clerk of the United States Circuit Court for the Southern District of New York, their bill of complaint against the said defendants, alleging that said defendants had infringed certain other copyrights of your orator in said bill described, by acts similar to those hereinbefore recited but, nevertheless, the defendants, as your orator is informed and believes, continue their violation of your orator's rights and have continued and are now continuing and threatening to sell all the books published by your orator under the protection of the copyright law, as well those herein and in the last mentioned bill of complaint described as others, and the defendants threaten and say that they will continue to sell your orator's copyright books in violation of the aforesaid conditions and restrictions upon which alone such books are sold or delivered to jobbers and wholesale dealers,

All which acts and doing of the defendants are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator in the premises.

In consideration whereof, and inasmuch as your orator can only have relief in the premises in this honorable Court, where matters of this nature are properly cognizable and relievable, and to the end that said defendants may, if they can, show why your orator may not have the relief hereby prayed for, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best of their knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and that the defendants may be decreed to account for and pay over the income and profits by their aforesaid unlawful acts derived in violation of your orator's right, and be restrained from any further violation of the said right, your orator prays that your Honors may grant a writ of injunction, issuing out of and under the seal of this honorable Court, perpetually enjoining and restraining said defendants, their clerks, attorneys, agents, servants, or workmen, from any further publication, sale circulation, or distribution in any manner of the said books hereinbefore mentioned, to wit: "Bred in the Bone," "Christmas Eve on Lonesome and other Stories," and "A Parody Anthology," and that they, and
12 each of them, be enjoined and restrained from obtaining the said books or either of them or any other of the copyrighted books published by your orators and acquired by defendants without due license from your orator, from the jobbers and booksellers to whom they have been transferred by your orator, by conditional sale, in violation of such condition; and that your Honors, upon the rendering of the decree above prayed for, may assess, or cause to be assessed, in addition to the profits to be accounted for by the

defendants as aforesaid, the damages which your orator has sustained by reason of such infringement of its rights.

And your orator further prays that a provisional and preliminary injunction may issue, restraining said defendants from any further infringement of the rights of your orator as aforesaid, and forbidding the acts which your orator has hereinbefore prayed your Honors to enjoin, and for such other and further relief as the equity of the case may require and to your Honors may seem meet.

May it please you Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said defendants Isidor Straus and Nathan Straus, commanding them, on a certain day, to appear and answer under this bill of complaint, and abide by such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

OLIN, CLARK & PHELPS,
Solicitors for Complainants, 32 Nassau Street, Borough of Manhattan, N. Y. City.

STATE AND COUNTY OF NEW YORK, *ss:*

Charles Scribner, being duly sworn, says he is the president of the complainant named in the above bill; that he has read the same and is acquainted with the facts therein stated: that said bill and the matters therein stated are true to the knowledge of deponent, except as to those matters stated on information and belief and as to
13 those matters he believes it to be true, and that the reason why this verification is not made by complainant is that the complainant is a foreign corporation. That this deponent is an officer of the said corporation complainant, to wit, the president, and that the grounds of his belief as to all matters not therein stated upon his knowledge are the books and papers of the said corporation and the information that comes to him in the regular discharge of his duties as the president thereof.

CHARLES SCRIBNER.

Sworn to before me this 23rd day of December, 1904.

HORACE D. BYRNES,
Notary Public, New York County.

EXHIBIT "A."

The American Publishers' Association, 156 Fifth Avenue, New York.

Plan as Amended to April 1st, 1904.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901: amendments referring to fiction, juveniles and other matters were adopted at later meetings.

Special attention is called to changes in the following Sections: 1, 3, 4, 5, 9 and 12.

I. That the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided however that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new editions, any work of fiction or any juvenile.

II. It is recommended that the Retail Price of a net book, marked *Net*, be printed on a paper wrapping covering the book.

III. That the Members of the Association agree that copyrighted books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their copyrighted books except at retail to no one who cuts such net prices.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

It is further agreed by the Members of the Association that they will not themselves offer, nor sell their copyrighted books to any one who offers, Protected books in combination with a periodical at less than the trade Subscription price of such periodical plus the Net or Minimum Retail price of the book.

IV. That the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net), published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.: and all the rules for the protection of net books shall apply to this extent to the protection of copyrighted fiction and copyrighted juvenile books published on the same basis as fiction.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount which, however, it is hoped will rarely be given.

V. The only exceptions to the foregoing rules shall be in cases of libraries which may be allowed a discount of not more
15 than 10 per cent. on net books and 33 1/3 per cent. on fiction, and juvenile books (not net).

Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books.

VI. That the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher.

VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so re-sold to him on demand.

VIII. That when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

IX. That for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board, the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association jobbers, and the trade, of any persons violating the above provisions, after giving the person accused of such violation an opportunity to explain his action.

X. That it shall be the duty of all Members of the Asso-
16 ciation to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

XI. That the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XII. That in making sales and contracts of sales of their books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

Endorsed: U. S. Circuit Court. Filed Dec. 23, 1904. Southern District, New York. John A. Shields, Clerk.

17 *Replication.*

Circuit Court of the United States, Southern District of New York.

CHARLES SCRIBNER'S SONS, Incorporated, Complainant,
against
ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-Partners, &c., Defendants.

This repliant, Charles Scribner's Sons, Incorporated, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendants, Isidor Straus and Nathan Straus, for replication thereunto, says that it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied to by this complainant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

Dated ——, December, 1904.

OLIN, CLARK & PHELPS,
Solicitors for Complainant, 32 Nassau Street, Borough of Manhattan, New York City.

Endorsed: U. S. Circuit Court, filed Dec. 23, 1904. Southern District, New York. John A. Shields, Clerk.

18 *Stipulation.*

United States Circuit Court, Southern District of New York. In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, &c., Complainant,
against
ISIDOR STRAUS and NATHAN STRAUS, &c., Defendants.

It is hereby stipulated and agreed that the defendants herein or their authorized agent, purchased of each of the books named in the bill of complaint herein at wholesale from wholesale booksellers, and at wholesale prices between the date of the copyrighting of each of said books and the date of the commencement of this action, a number of copies approximately equal to the number below set opposite the name of each of the said books, to wit:

Bred in the Bone, about 100 copies, @ 85 to 90 cents per volume.
Christmas Eve on Lonesome, about 800 copies, @ 85 to 90 cents per volume.
A Parody Anthology, about 25 copies, @ 1/3 off list price of $1.25.

And it is stipulated and agreed that the defendants purchased of each of the books last above named at retail from booksellers at the regular retail prices not more than 10 per centum of the number of copies above set opposite the name of each book.

And it is further stipulated and agreed that the defendants herein or their authorized agent are continuing to purchase of each of the books above named at wholesale, at wholesale prices, from wholesale booksellers, approximately 90 per cent. of the total number of copies of such book purchased by the defendants.

19 It is stipulated and agreed further that the term "wholesale prices," as used in the foregoing stipulation in reference to the purchase of books, means prices lower than the prices named by the complainant as the lowest price at which their books might be sold at retail by book dealers.

It is further stipulated and agreed that the list of names published in "The Book and News Dealer," under the title "Dealers whose supply of copyrighted books has been stopped," contains the same names placed in the so-called cut-off list of the American Publishers' Association.

It is also stipulated and agreed that the evidence heretofore taken, and exhibits heretofore offered in evidence in the action brought in the Court above named by Charles Scribner and Arthur H. Scribner, individually, and as co-partners doing business under the firm name and style of Charles Scribner's Sons, complainants, against Isidor Straus and Nathan Straus, individually and as co-partners trading under the firm name and style of R. H. Macy & Co., defendants, shall be a part of the record in this action as if separately taken and sworn to herein, *mutatis mutandis*, without being reprinted in said record herein, subject to all exceptions taken to the admission of said evidence which were taken in the said action of Charles Scribner and Arthur Scribner against Isidor Straus and Nathan Straus above mentioned.

It is further stipulated and agreed that the foregoing stipulation is made subject to all objections and exceptions by either party to the above entitled action as to the relevancy, materiality and competency of the facts stipulated which said party might have taken upon the taking of proof herein as to the said facts.

Dated December 17, 1904.

OLIN, CLARK & PHELPS,
Solicitors for Complainant.
SPIEGELBERG & WISE,
Solicitors for Defendants.

20 *Answer.*

Circuit Court of the United States for the Southern District of New York.

In Equity. Suit No. 2.

CHARLES SCRIBNER'S SONS, Incorporated, Complainant,
against
ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name and Style of H. R. Macy & Co., Defendants.

The joint answer of the defendants Isidor Straus and Nathan Straus, individually and as co-partners trading under the name of R. H. Macy & Company to the bill of complaint of the above named complainant:

1. These defendants saving and reserving to themselves all and all manner of benefit, advantage or exception which may be had or taken to the manifold errors, uncertainties, imperfections and insufficiencies in the said complainants' said bill of complaint contained, for answer thereto or unto so much and such parts thereof as they are advised are material for them to answer, answering say:

II. The defendants admit the allegations contained in paragraphs I, II and III of said bill of complaint.

III. These defendants admit the allegations contained in paragraph IV of the said bill of complaint in so far as the same alleges the incorporation of the American Publishers' Association under the laws of the State of New York, and in so far as it is alleged in said paragraph that said Association has not attempted to limit the supply of books by its members to all jobbers and book-
21 sellers who will comply with the rules of the Association, and that members thereof have dealt and are dealing with all jobbers and booksellers who comply with the rules of the Association, but that they deny each and every other allegation in said paragraph contained.

IV. These defendants admit that the said American Publishers' Association made certain rules as alleged in paragraph V of the complaint; that a copy of said rules adopted on February 13, 1901, and amended by resolutions adopted January 8, 1902, and May 27, 1902, and subsequent to April 1, 1904, are correctly set forth in Exhibit A, annexed to said bill, but they deny that the said rules were made or intended for the protection of the purchasing public or that said rules provided or were intended to provide that all purchasers of books at retail except public libraries should be able to buy copyrighted books at the same price without secret or other discounts or rebates.

V. These defendants admit, on information and belief, that the complainants have made all sales of books subject to the rules of

American Publishers' Association as set forth in paragraph VI of the bill of complaint, but they deny that any of said sales were conditional sales, and they deny that in any of such sales there was any reservation to the complainants of an interest in such books sold, or any reservation of any rights secured by the copyright covering the same.

VI. These defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph VII of the bill of complaint and therefore require proof thereof.

VII. These defendants, for the purposes of this action, admit that the complainants took out certain copyrights as alleged in paragraph VIII, and they furthermore, for the purposes of this action, admit all the allegations contained in the subdivisions of said paragraph VIII, being paragraphs VIII-1 to VIII-3 both inclusive.

VIII. These defendants furthermore admit that the complainants made sales of said described books in accordance with the
22 rules and regulations of the American Publishers' Association, as set forth in paragraph IX of the bill of complaint, but these defendants have no information sufficient to form a belief as to whether the complainants have at all times refused to sell to anyone any of said books, and, therefore, deny said allegation, and these defendants have no knowledge or information sufficient to form a belief as to whether every purchaser of such books had at the time of the purchase, full and complete notice of the conditions upon which said books were sold, or accepted the same as alleged in said paragraph IX, and, therefore, require proof thereof. And these defendants deny that either by virtue of any alleged conditional sale of said books, or by reason of the copyrights issued thereupon, or by reason of both, have the complainants become entitled to the full performance of said alleged conditions in so far as these defendants are concerned, and, therefore, these defendants deny all the allegations contained in that portion of paragraph IX of the bill of complaint, beginning at folio 174 with the words "that by virtue of the conditional sale of the said books" down to and including the end of said paragraph.

IX. These defendants deny all the allegations contained in paragraph X of the bill of complaint, excepting that these defendants had knowledge of the rules and regulations of the American Publishers' Association, and that these defendants have sold and exposed for sale copies of books published under the copyrights owned by the complainants, but they specifically deny that they printed any of said copyrighted books, and deny that they have published any of said books covered by such copyright otherwise than by selling some of the books and delivering the same to the purchasers thereof.

X. These defendants deny all the allegations of subdivision 2 of paragraph X of the bill of complaint.

XI. These defendants deny all of the allegations contained in paragraph XI of the bill of complaint.

XII. These defendants admit, as alleged in paragraph XII of the bill of complaint that Charles Scribner and Arthur H. Scribner,

individually and as co-partners, under the firm name and
23 style of Charles Scribner's Sons, filed a bill of complaint against these defendants substantially in the same form as the present bill of complaint, excepting in that there are therein specified different books than described in the present bill of complaint; and these defendants admit that they refused to abide by the rules and regulations of the American Publishers' Association, but they deny, as they are informed and believe, that by any acts of theirs or by any disobedience to the rules of the Publishers' Association, they are violating the complainant's rights or any conditions of sale of such books, or that their acts are contrary to equity and good conscience, and tend to the wrong or injury of the complainant.

And for a further answer and defense herein, these defendants allege:

1. That these defendants are advised and believe the complainant's remedy in the premises, if any, is adequate and complete at common law, and that the alleged cause of action set forth in the bill of complaint is not a proper cause for the intervention of a Court of Equity, and that as these defendants are advised and believe a Court of Equity has not jurisdiction thereof.

And for further answer and defense herein, these defendants allege:

2. That during the year 1900, the complainant or its predecessors and a large number of other publishers, for the purpose of securing to themselves an unreasonable and extortionate profit, and with the intent to prevent competition in the sale and supply of books in the State of New York and throughout each and all of the States and Territories of the United States, and for the purpose of establishing and maintaining the retail price of all copyright books published by them or any of them, and of all books dealt in by them or any of them, and preventing competition in the sale and supply thereof in the State of New York and elsewhere throughout the United States, unlawfully, illegally and contrary to the public policy and statutes of the State of New York and of the United States, combined and associated themselves together and as a part of such
24 unlawful combination or scheme formed and incorporated a membership corporation under the laws of the State of New York under the name of the American Publishers' Association, which included amongst its members the complainants herein and a large majority constituting about 95% in numbers and extent of business of the publishers of all books in the State of New York and throughout the United States.

3. And defendants say that in furtherance of said unlawful combination or scheme the American Publishers' Association and its various members, including the complainants herein or *its* predecessors, immediately after its organization adopted resolutions and entered into agreements with each other which were intended to prevent the cutting or reducing of prices on copyrighted books published by the members of the said Association, including the complainants herein or *its* predecessors, by which each of the mem-

bers of the said Association, including the complainants or *its* predecessors, agreed that all copyrighted books published by any of them after May 1st, 1901, should be published and sold at retail at net prices, that is, the published price thereof and not be subject to any discounts or reductions.

4. That as a part of said unlawful scheme and combination the members of the said Association, including the complainants herein or *its* predecessors, agreed that such net copyrighted books, and all other books, whether copyrighted or not or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail price of such copyrighted books for one year, and to those booksellers and jobbers only who would sell books at wholesale to no one known to them to cut, or sell at lower figure that such retail price, or whose name should be given to them by said Association as one who cut such prices.

5. Defendants allege that an office was established by said American Publishers' Association for the purpose of carrying out the aforesaid plan, and the members thereof, including the complainants or *its* predecessors, agreed that through the agents of the said Association, and the members thereof, they would aid in the formation of a booksellers' association to co-operate with the said American Publishers' Association, to assist in said unlawful scheme to maintain the retail price of books as aforesaid, and prevent competition in the price and supply thereof in the State of New York, and elsewhere throughout the United States, and that the said American Publishers' Association and all the members thereof including the plaintiff or its predecessors themselves to support said booksellers' association by every means in their power.

6. That thereafter the American Booksellers' Association, composed of 90% in numbers and extent of business of the booksellers at wholesale and retail throughout the State of New York and the United States, was organized through the efforts and influence of the said American Publishers' Association and its members, including the complainants herein or *its* predecessors, for the avowed purpose of co-operating with the said American Publishers' Association and its members, in the unlawful purpose of maintaining the retail prices of copyrighted books and preventing competition in the sale of all books and in the price and supply of the same, whether copyrighted or not, in the State of New York, and throughout the United States and for the purpose of monopolizing trade or commerce in books among the several states, and for the purpose of restraining trade or commerce in books among the several states.

7. And defendants say that in pursuance of said unlawful agreement, neither of said associations nor any of the members thereof, including the complainant nor its predecessors would or will now sell or supply any books at any price, to any dealer in the State of New York, or elsewhere in the United States, whether a member of said Associations or not, and whether such books were copyrighted or not, or were or were not published by the said American Publishers' Association of its members who did not maintain said arbitrary retail price on copyrighted books, or who would re-sell, or was sus-

pected of re-selling, such copyrighted books to any dealer who thereafter sold the same at less than the arbitrary price fixed by said unlawful combination.

8. That thereafter, to wit, on or about the 31st day of
26 March, 1903, the said American Publishers' Association and its members, including the complainant or its predecessors, entered into a further agreement whereby it was agreed that on all copyrighted books and fiction (not net) which had been published by them after February 1st, 1902, and on all board books, flat picture books or toy books (not net) published by them after March 1st, 1903, the greatest discount allowed at retail for one year after publication should be 28 per cent., and that all the rules and regulations theretofore agreed upon to fix prices and prevent competition in the sale of net books should apply to this extent to the sale of fiction, and juvenile board books, published on the same basis as fiction.

9. That thereafter and during the month of February, 1904, in an action brought by these defendants in the State Courts of the State of New York against the American Publishers' Association and such publishers, members thereof as were within the jurisdiction of the Court and the American Booksellers' Association and a number of members thereof, within the jurisdiction of that Court, the Court of Appeals of the State of New York rendered its decision that the combination and agreements of the defendants in that action being such as hereinbefore set forth were unlawful and contrary to the declared public policy of the State of New York and more especially of the statute law of said State known as Chapter 690 of the Laws of 1899.

10. That thereafter the American Publishers' Association and its members and the American Booksellers' Association and its members pretended to change the rules, regulations and agreements condemned as illegal and unlawful by the Court of Appeals of the State of New York in so far as the same affected uncopyrighted books, but continued the same in so far as all copyrighted books were concerned, and these defendants charge that none of the members of the Publishers' Association or of the Booksellers' Association will sell any copyrighted books of any kind whether published by them or not, or whether the copyright is owned by them or not, to any dealer in the State of New York or elsewhere in the United States, who does not maintain said arbitrary retail price on copyrighted books or who would resell, or who are suspected of reselling, such copy-
27 righted books to any dealer who thereafter sold the same at retail at less than the arbitrary price fixed by said unlawful combination.

11. That ever since May 1st, 1901, the two aforementioned Associations and the respective members thereof, including the complainant herein, have unlawfully and contrary to the declared policy of the State of New York and its statutes and the statutes of the United States, maintained such combination whereby competition in the State of New York, and throughout all the States of the United States, in the sale and supply and price of books has been

and is restrained or prevented, and whereby trade or commerce in books among the several States has been and is monopolized by the said combinations, and trade or commerce among the several States has been and is restrained, and whereby the free pursuit in the State of New York and throughout the United States, of the lawful business of selling books has been, and is restricted or prevented.

12. That the purpose and intent of said unlawful conspiracy and combination was, and is, to establish and maintain increased and excessive prices for books, and thereby secure to the publishers and dealers who are members of said Associations, including the plaintiffs herein, an increased and extortionate profit, and that such purpose and intent has been and still is being carried into effect, and that by reason thereof the prices of books and the profits thereon have been and still are unreasonably increased.

13. That the members of the said American Publishers' Association, including the complainants and the members of the said American Booksellers' Association, were at the time when said combinations were formed, and have been at all the times since then, and since the formation of said Associations, and now are engaged in the business of interstate commerce. That the members of said Associations, including the complainants herein, do now, and at all the times herein mentioned have resided and carried on their business of selling books in many different States, and that in the conduct of their business as wholesale and retail dealers in books,
28 the members of the said two Associations, including the complainants herein, were, and now are engaged in the business of purchasing books, copyrighted and non-copyrighted, from each other and from other persons in many States other than the States in which the purchaser resided, and now resides and does business; and all such books are and have been transported in compliance with the contract of purchase from the State where such books were purchased, and delivered to the purchaser in the State where he resides and conducts business. And members of both of said Associations, including the complainants herein, also sell and have sold books to many persons who are not members in States other than the one in which they reside and conduct their business, and all such books are transported in compliance with the contract of purchase from one State to another, and then delivered to the purchaser thereof.

14. That the members of the said two associations, including the complainants herein and their predecessors, do now and have heretofore conducted the production, sale, at wholesale and retail, and distribution of the majority of all books produced and dealt in throughout the State of New York, and all the other States and Territories of the United States.

15. The defendants say that all the rules, regulations and agreements made by the said two associations and its members, including the complainants and *its* predecessors as hereinbefore set forth were intended to be applied to and be enforced, and have been and are now applied to and enforced, against all publishers and dealers in books throughout all the States of the United States, whether such publishers and dealers are or are not members of either of said asso-

ciations, and whether they purchase books in one State for transportation to another, or for delivery in the State where purchased.

16. That the complainants herein, and for the most part the other members who are publishers and members of the American Publishers' Association, do now sell, and have at all the times heretofore mentioned, sold, their own publications at wholesale to wholesale book dealers, and to large retail dealers, and in addition
29 thereto, and at all the times heretofore mentioned conducted, and still do conduct large retail stores wherein they sell not only their own publications, copyrighted and not copyrighted, at retail, but also all publications, copyrighted and not copyrighted, of all other publishers, and that by preventing competition in the sale and supply and maintaining the prices of books at retail, as hereinbefore set forth, the complainants and all other publishers, members of the said American Publishers' Association, have and do now secure an unreasonable and extortionate advantage and profit to themselves and to each other, both in the wholesale and retail prices of books dealt in by them.

17. That the defendants are not now and never have been members of either of said associations or parties to any of the unlawful agreements hereinbefore set forth, nor have they at any time agreed to abide by any of the rules of either of said associations. And these defendants further say that shortly after May, 1901, the complainants herein or *its* predecessors, under and pursuant to the rules of the said American Publishers' Association and the said American Booksellers Association, refused to deal with these defendants in their books, copyrighted and non-copyrighted, and warned all wholesale and other dealers from selling books published or dealt in by complainant- to these defendants for the reason, as these defendants are informed and believe, that these defendants refused to maintain and sell at the arbitrary fixed price established a copyrighted book of another publisher and member of said Publishers' Association, to wit: of Funk & Wagnalls Company, and that at the time that the complainants herein or *its* predecessors so refused to deal with the defendants or permit others to deal with them in their copyrighted or non-copyrighted books, these defendants had not sold any copyrighted books published by the complainants or *its* predecessors under the rules and regulations of the said American Publishers' Association at all at any price. And these defendants further allege that the complainants herein have brought this action ostensibly in their own behalf, but really as a part and parcel of the plan of the American Publishers' Association and its members to enforce and es-
30 tablish the arbitrary rules adopted by it and its members, including the complainants and by the American Booksellers' Association and its members, and that this action has been brought and is being prosecuted for the benefit of all the members of the said American Publishers' Association and the said American Booksellers' Association and the said two associations, and not for the purpose of protecting any rights secured to the complainants by any copyright alleged by them.

Wherefore, these defendants pray that they may be hence dis-

missed and that they may have and recover of the complainants the costs and expenses of this suit in that behalf most wrongfully sustained.

R. H. MACY & CO.,
By ISIDOR STRAUS.
ISIDOR STRAUS.
NATHAN STRAUS,
By ISIDOR STRAUS, *Att'y.*
SPIEGELBERG & WISE,
Solicitors for Defendants, 19 William Street, New York City.

J. G. CARLISLE,
EDMOND E. WISE,
Of Counsel.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Isidor Straus, being duly affirmed, says that he is a member of the firm of R. H. Macy & Company, and one of the defendants in the above entitled action. That he has read the foregoing answer and is acquainted with the facts therein stated, that said answer and the matters therein stated are true to the knowledge of deponent,
31 except as to those matters stated on information and belief, and as to those matters he believes it to be true.

ISIDOR STRAUS.

Affirmed before me this 21st day of December, 1904.

J. MANHEIMER,
[SEAL.] *Notary Public, New York County.*

Endorsed: U. S. Circuit Court. Filed Dec. 23, 1904. Southern District, New York. John A. Shields, Clerk.

Stipulation.

United States Circuit Court, Southern District of New York. In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, &c., Complainant,
against
ISIDOR STRAUS and NATHAN STRAUS, &c., Defendants.

It is hereby stipulated and agreed that in the answer of the defendants herein to the complainant's bill of complaint, the words "amended bill of complaint" be read wherever the words "bill of complaint" occur therein.

OLIN, CLARK & PHELPS,
Solicitors for Complainants.

Endorsed: U. S. Circuit Court. Filed Dec. 23, 1904. Southern District, New York. John A. Shields, Clerk.

32 *Exceptions to Answer.*

Circuit Court of the United States for the Southern District of New York. In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, etc., Complainant,
against
ISIDOR STRAUS and Another, etc., Defendants.

Exceptions taken for impertinence by the above named complainant to the answer of the defendants to the amended bill of complaint of the said complainant filed in this cause on the 23rd day of December, 1904.

First Exception. The complainant excepts to paragraph 1 of the second "further answer and defense" of said answer, as impertinent, because the same is wholly immaterial, irrelevant and cannot be put in issue in the cause.

Second Exception. To paragraph 2 of said second "further answer and defense."

Third Exception. To paragraph 3 of said second "further answer and defense."

Fourth Exception. To paragraph 4 of said second "further answer and defense."

Fifth Exception. To paragraph 5 of said second "further answer and defense."

Sixth Exception. To paragraph 6 of said second "further answer and defense."

Seventh Exception. To paragraph 7 of said second "further answer and defense."

33 Eighth Exception. To paragraph 8 of said second "further answer and defense."

Ninth Exception. To paragraph 9 of said second "further answer and defense."

Tenth Exception. To paragraph 10 of said second "further answer and defense."

Eleventh Exception. To paragraph 11 of the said second "further answer and defense."

Twelfth Exception. To paragraph 12 of said second "further answer and defense."

Thirteenth Exception. To paragraph 13 of said second "further answer and defense."

Fourteenth Exception. To paragraph 14 of said second "further answer and defense."

Fifteenth Exception. To paragraph 15 of said second "further answer and defense."

Sixteenth Exception. To paragraph 16 of said second "further answer and defense."

Seventeenth Exception. To paragraph 17 of said second "further answer and defense."

All and singular the said exceptions being taken on the ground of

impertinence because the said paragraphs of the said "further answer and defense" are and each of such paragraphs is wholly immaterial, irrelevant and cannot be put in issue in the cause.

In all which particulars this exceptant excepts to the answer as impertinent and humbly insists that said paragraphs should be expunged from the said answer.

OLIN, CLARK & PHELPS,
Solicitors for Complainant, 32 Nassau Street, New York City.

Endorsed U. S. Circuit Court. Filed Dec. 23, 1904, Southern District, New York. John A. Shields, Clerk.

34 *Order Sustaining Exceptions.*

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Room in the Borough of Manhattan in the City of New York on the 23rd day of December in the year of our Lord One thousand nine hundred and four.

Present: Hon. E. Henry Lacombe, Circuit Judge.

CHARLES SCRIBNER'S SONS, Incorporated, etc., Complainant,
against
ISIDOR STRAUS ET AL., etc., Defendants.

The defendants herein having been duly served with a *subpœna ad respondendum* commanding them to appear and answer the bill of complaint of the complainant herein filed in the office of the Clerk of this Court on the 15th day of December, 1904, and complainants having filed their amended bill of complaint herein on the 23rd day of December, 1904, and the defendants aforesaid having duly appeared herein and thereafter filed their answer to the amended bill of complaint in the office of the aforesaid Clerk on the 23rd day of December, 1904, and the complainant having thereupon on the 23rd day of December, 1904, duly filed in the office of the Clerk aforesaid *their* certain exceptions to the answer of the defendants and the said exceptions having duly come on to be heard at a Stated Term of this Court for the hearing of motions held in and for the Southern District of New York on the 23rd day of December, 1904. Now, after hearing Stephen H. Olin, Esq., of counsel for the complainant, in support of said exceptions, and E. E. Wise, Esq., of counsel
35 for defendants, appearing in opposition thereto, and due deliberation having been had, it is

Ordered that the exceptions of the complainant to the answer of the defendants herein be and the same hereby are sustained, and that paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 of the "further answer and defense" of the defendants herein be and the same hereby are stricken out as impertinent.

E. HENRY LACOMBE, *U. S. C. J.*

Endorsed U. S. Circuit Court. Filed Dec. 23, 1904, Southern District, New York. John A. Shields, Clerk.

36 *Testimony.*

In the Circuit Court of the United States, Southern District of New York. In Equity.

CHARLES SCRIBNER and Another, Complainants,
vs.
ISIDOR STRAUS and Another, Defendants.

Proofs on behalf of the complainants, taken pursuant to notice, under the 67th Rule in Equity as amended, before John A. Shields, Esq., Standing Examiner, at the office of the complainants' solicitor, No. 32 Liberty street, Borough of Manhattan, City of New York, on Wednesday, August 24th, 1902, at 11 A. M.

Appearances.

Stephen H. Olin, Esq., of counsel for the complainants.
Edmund E. Wise, Esq., of counsel for the defendants.

E. LILIAN KINNEAR, a witness called on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr OLIN:

Q. 1. What is your name, residence and occupation, Miss Kinnear?

A. E. Lilian Kinnear, 351 West 15th street; buyer for several departments for R. H. Macy & Company.

Q. 2. How long have you been in the employ of the defendants, R. H. Macy & Company?

A. About 22 years, in the 23rd.

Q. 3. And for the last seven years you have been at the head of the book department, and as such have made all purchases of books and supervised the sale thereof at retail, have you not?

A. Over eight years, I think, now; it is nearer nine.

37 Q. 4. Upwards of eight years?

A. Yes, sir.

Q. 5. It has been your duty, has it not, to familiarize yourself, not only with the purchases of books from the publishers and large jobbers, but with the retailer's methods of disposing of books over the counter to the public at large?

A. What do you mean by that, Mr. Olin? You mean that I familiarize myself with the prices?

Q. 6. And the methods of disposal of books, and the methods of conducting the trade both by publishers and retailers and jobbers?

A. Yes, sir.

Q. 7. Books are furnished to the public by retailers, are they not, for the most part?

A. Yes. Retailers and jobbers sell them to the public; publishers sell them to the public.

Q. 8. And wholesale book dealers and jobbers, such as the American News Company, the Baker-Taylor Company, and other similar concerns, do not sell at retail, but distribute the books among the small retailers, or outside of the city, where the publisher conducts his business; that is a fact, is it not?

A. I think that they would sell at retail also; in fact, I am quite sure that jobbers would, if necessity demanded, or they had a call for it.

Q. 9. As a general rule?

A. As a general rule, Oh, yes.

Q. 10. The defendants in this action, the firm of R. H. Macy & Company, are large retailers, are they not, of books?

A. Yes, sir.

Q. 11. As well as other merchandise?

A. Yes, sir.

Q. 12. Do you remember in the year 1900, there was a disorganization in the book trade, and an attempt was made to re-organize and establish new rules in regard to it?

A. There has been no disorganization, as far as I am concerned, Mr. Olin. When I say I, I mean R. H. Macy & Company.

Q. 13. What did you mean, then, when in your affidavit, sworn December 3rd, 1902, in the suit of Isidor Straus and another
38 against the American Publishers' Association, in the New York Supreme Court, you said, "During the year 1900 the retail book trade became very much disorganized by reason of the foregoing facts?"

A. I don't understand your question.

Q. 14. That was true, what you said in that affidavit?

A. Entirely true.

Q. 15. And do you remember in October, 1900, a circular was issued to the trade, of which a copy was sent to the firm of R. H. Macy & Co., and did you produce in that suit a copy of that circular and annex it to your affidavit?

A. (Witness examines affidavit.) Yes, sir.

Q. 16. Is the paper I now show you, from folios 83 to 92 of the printed papers on appeal from order dated May 25th, 1904, in the case of Straus against the American Publishers' Association, in the New York Supreme Court, a copy of that circular?

A. Yes, sir.

Mr. OLIN: I offer that in evidence.

Mr. WISE: Objected to as entirely irrelevant, immaterial and incompetent.

The paper referred to is marked "Complainants' Exhibit 1, of August 24th, 1904, J. A. S., Ex'r."

Q. 17. Subsequently, Miss Kinnear, you received another circular, embodying resolutions of the American Publishers' Association, which you also produced and annexed to your affidavit in the action mentioned in the Supreme Court, and a copy of which is found from folios 93 to 100, inclusive, in the same record?

A. I can't remember if I received it.

Q. 18. You saw it about the time of its issue, did you not?

A. I saw it about the time of its issue, but I can't remember whether I received it.

Q. 19. You subsequently annexed it to that affidavit?

A. Yes, sir.

Mr. OLIN: I offer that in evidence.

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

39 The paper referred to is marked "Complainants' Exhibit 2, of August 24th, 1904, J. A. S., Ex'r."

Q. 20. You were informed that after the issue of the resolutions, dated February 13th, 1901, new resolutions relating to works of fiction were adopted by the American Publishers' Association, were you not?

A. Yes.

Q. 21. I show you the copy circular annexed to the bill of complaint in this action, being plan of American Publishers' Association, as amended to March 4th, 1903, and ask you if you saw that circular?

A. I did.

Q. 22. The firm of R. H. Macy & Company had refused to enter the American Publishers' Association or to abide by any of its rules, had it not?

A. They had.

Q. 23. Prior to May 1, 1901, Funk & Wagnalls Company, a member of the American Publishers' Association, had advertised for publication, a work of fiction called "Tarry Thou Till I Come;" it was advertised under the rules of the association as a net book, to be sold by all dealers at retail at $1.40; that is true, is it not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

A. Yes.

Q. 24. You had purchased for R. H. Macy & Co., large quantities of books, and sold the same at $1.24, had you not?

Mr. WISE: Same objection.

A. Yes.

Q. 25. Mr. Emory, the manager of the American Publishers' Association, sought to persuade you to maintain the price called the net price, of $1.40, which with the sanction of R. H. Macy & Company, after consultation, you refused to do?

Mr. WISE: Same objection.

A. Yes.

Q. 26. Thereafter the American Publishers' Association is-

40 sued a circular, requesting all publishers and wholesale booksellers, and also retail book dealers, to refuse any dealing of any kind with R. H. Macy & Company?

Mr. WISE: I object to that as asking for hearsay on the part of the witness, and as being incompetent, irrelevant and immaterial.

A. They did.

Q. 27. And you so stated in an affidavit?

A. Yes, sir.

Q. 28. Now, after that the firms which were members of the American Publishers' Association refused to sell you their copyright books, did they not, for R. H. Macy & Co., except at retail?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer the question.

Q. 29. After that circumstance which you last mentioned, did the Charles Scribner's Sons decline to sell their copyright books to the firm of R. H. Macy & Company?

A. They did.

Q. 30. And that refusal has continued up to the present time?

A. It has.

Q. 31. I show you a list of books contained in paragraph 9 of the bill of complaint herein, and ask you whether those books have been sold by the firm of R. H. Macy & Company?

A. To the best of my knowledge the majority of them have.

Q. 32. You are aware, are you not, that the firm of Charles Scribners' Sons issued its books under the rules of the American Publishers' Association?

A. I know that they are members of the American Publishers' Association.

Q. 33. And one member of the firm, Mr. Charles Scribner, has been an officer of the association, has he not?

A. So I believe.

Q. 34. And active in enforcing its rules?

A. So I believe.

Q. 35. Such of those books as have been sold by you have
41 been sold at lower prices than the prices fixed by the rules of the American Publishers' Association, have they not?

A. They have.

Q. 36. Can you say what discount from the published retail price of works of fiction the firm of R. H. Macy & Company sold those books at?

A. Varied discounts.

Q. 37. But greater, in all cases, than 28 per cent., was it not?

A. In every case. One moment. Not on the net books. You asked me fiction?

Q. 38. I mean to apply the question only to fiction. Now, in regard to what are known as net books in the trade, such of those books as are net books were sold by R. H. Macy & Co., when sold at all, at less than the net price?

A. They were.

Q. 39. Will you look again at the list of books set forth in paragraph 9 of the bill of complaint herein, and say where R. H. Macy & Company obtained the books which they sold as you have stated?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer that question.

Q. 40. Did you obtain any of the books that were so sold by you,

and are mentioned, in paragraph 9 of the bill of complaint, from the firm of Charles Scribner's Sons directly?

A. We may have; I couldn't remember at this time; we may have purchased them.

Q. 41. Did you make any purchases during that period?

A. We may have at retail.

Q. 42. At retail. Can you tell how extensive those purchases were?

A. I couldn't.

Q. 43. Do you keep a record of your purchases?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

A. Of the names of the books purchased?

Q. 44. I ask you generally of books purchased?

A. Yes.

42 Q. 45. What is that record kept in, what book?

A. I don't believe I quite understand you, Mr. Olin; I must have you ask that question again.

Q. 46. Is there kept in the book department of R. H. Macy & Co., a record of purchases of books which are sold in that department

A. Yes.

Q. 47. Under whose direction is that kept?

A. The head bookkeeper's.

Q. 48. Do you have any superintendence of it, or control of it?

A. I purchase all books direct.

Q. 49. And do you give the head bookkeeper the information from which he makes his entries?

A. He receives all my bills.

Q. 50. And does he enter the purchases from those bills?

A. As purchases from E. L. Kinnear.

Q. 51. So that all the books sold by R. H. Macy & Co. appear to have been purchased from E. L. Kinnear?

A. Are purchased from E. L. Kinnear.

Q. 52. Now, do you keep a record of persons from whom you purchase those books which you furnish R. H. Macy & Co.?

A. No, sir.

Q. 53. Do you keep the bills which you pay to different persons?

A. I make a cash purchase in every case.

Q. 54. Do you take a receipt?

A. Rarely.

Q. 55. When you said that the bills which you had paid were furnished to the head bookkeeper, what did you mean?

A. That E. L. Kinnear's bills are furnished to the head bookkeeper.

Q. 56. And the bills which you receive, what is done with those?

A. I have no further use for them.

Q. 57. What is done with them?

A. Destroyed.

Q. 58. Do you destroy them?

A. I destroy them.

Q. 59. How soon do you destroy them after paying them?

43 Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 60. How long has this system of bookkeeping been carried on in your business?

A. Sometime in the year 1901.

Q. 61. Prior to that time, the books of R. H. Macy & Co. showed that the purchases were made from the different dealers from whom the books came, did they not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and I request the witness not to answer.

Q. 62. Will you now look again at the copy of the bill of complaint in this action, which I handed you, at paragraph 9 thereof, and say where, according to your best recollection, you obtained the supplies of the book called, "In the Grip of the Mullah," which have been sold by you?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and I request the witness not to answer.

Q. 63. I now ask you a like question as to each of the books mentioned in that paragraph of the bill of complaint?

Mr. WISE: Same objection and request.

Q. 64. Since the existence of the American Publishers' Association, you have been compelled to purchase books through secret ways, have you not?

A. Entirely.

Q. 65. And it is for that reason that you are unwilling to disclose the methods and means by which you secure the supply of books for the store?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent and direct the witness not to answer.

Q. 66. Did you not so depose in an affidavit furnished by you to the Messrs. Straus, and produced in the said action brought by them against American Publishers' Association, in the Supreme Court of the State of New York, at folio 120 of the printed book already alluded to?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and as not being in the line of direct-examination of the
44 witness, and as seeking to impeach the complainants' own witness.

A. I said that I was compelled, and am compelled, to purchase books through secret ways, and I am unwilling to tell you from whom I purchase them.

Q. 67. Can you say positively, Miss Kinnear, that any of these books mentioned in paragraph 9 of the bill of complaint, were purchased by you, or by your direction, at retail at the complainants' store?

A. I can't say positively that they were.
Q. 68. Can you say that they were purchased anywhere?
A. At retail?
Q. 69. At retail.
A. Most assuredly they were.
Q. 70. How many of them?
A. I couldn't tell you.
Q. 71. Were a tenth part of them purchased at retail?
A. I couldn't tell you at this late date, Mr. Olin.
Q. 72. When making affidavits in the suit mentioned, in the Supreme Court, brought by the Messrs. Straus against the American Publishers' Association, you swore that the book department was conducted for the purpose of making profit, did you not?
A. I did.
Q. 73. And that the practice of selling goods at less than they cost, was confined to the magazines and didn't extend to the books, did you not?
A. Under ordinary circumstances.
Q. 74. Was that true?
A. Absolutely.
Q. 75. Was it true about these books mentioned in paragraph 9 of the bill of complaint?
A. No.
Q. 76. Were those sold by you at a loss?
A. They were.
Q. 77. All of them?
A. All purchased at retail.
Q. 78. What proportion of them was sold at a loss?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

45 Q. 79. Can you say as to your general dealings in copyrighted books at the present time, what proportion of them is obtained at retail?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and I request the witness not to answer.

Q. 80. The purchase at retail is not the only source from which you obtained the books mentioned in paragraph 9 of the bill of complaint, is it?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and I request the witness not to answer.

Q. 81. Did you obtain any of those books from jobbers?

Mr. WISE: Same objection and same request.

Q. 82. Did you get any of these books mentioned in paragraph 9 of the complaint from out of town?

Mr. WISE: Same objection and request.

Q. 83. You understand that with reference to these books mentioned in paragraph 9 of the complaint, every bookseller must, be-

fore he can purchase any books, whether for sale in his own state of for trans-shipment to another state, sign a pledge to the American Publishers' Association to the effect that for a specified time he will sell all books subject to the rules of said American Publishers' Association; do you not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and on the further ground that it is not within the absolute knowledge of the witness and necessarily must be on information and belief.

A. I believe that all are asked to sign the agreement.

Q. 84. And you understand each one must before the books are purchased, whether for sale in his own state or for trans-shipment to another state, sign such a pledge?

Mr. WISE: I object to that upon the same grounds.

A. I understand they are asked to sign it.

Q. 85. And they must sign it before obtaining the books, don't you understand?

46 A. I understand that they are asked to sign it.

Q. 86. Well, have you not sworn in this suit that they must sign it to obtain books?

A. Yes, sir.

Q. 87. And that was true, was it not?

A. As far as I know.

Q. 88. The firm of R. H. Macy & Company undertook to prevent the carrying out of this rule of the American Publishers' Association, did they not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent.

A. R. H. Macy & Co. refused to become one of the members or to sign any agreement whatever.

Q. 89. And they also brought a suit in the Supreme Court of the State of New York, intended against the American Publishers' Association and some of its members and others, asking for an injunction to prevent the enforcement of these rules, did they not?

A. They did.

Q. 90. You read the complaint in that action, did you not?

A. I did.

Q. 91. And made various affidavits in the course of that litigation.

A. I did.

Q. 92. And were acquainted with its progress from time to time?

A. Yes.

Q. 93. Prior to December 11th, 1902, the book department had been conducted for the purpose of making a profit, and had made a profit entirely satisfactory in amount to any dealer, in your opinion, had it not?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent to this action.

A. It had.

Q. 94. And you made affidavit to the effect, that in order to meet competition of other dealers, or to diminish an over-large or unsaleable stock you had occasionally offered books for sale at cost price and sometimes even less, but this had been done only in those
47 emergencies where a similar policy would have been adopted by any of your competitors in order to meet competition or diminish the stock; is that true?

Mr. WISE: I object to that as incompetent, irrelevant and immaterial, and in so far as the question relates to the present time I request the witness not to answer.

Q. 95. I asked you to state whether that is still true of the book department?

Mr. WISE: Same objection and request not to answer.

Q. 96. I ask you to say whether that is true of your sales of those books set forth in paragraph 9 of the complaint?

Mr. WISE: Same objection and request not to answer.

Q. 97. Did you state in the affidavit last referred to, sworn 11th December, 1902, that the books which you had succeeded in buying were bought from people who knew the price for which deponent bought them, who knew deponent and the position which she occupied, and who were willing to take the risk of incurring the displeasure of the combined publishers and combined booksellers for the profits that she offered them. Did you swear to that?

A. I did.

Q. 98. Was that true?

A. Absolutely.

Q. 99. Is that true as to the books mentioned in paragraph 9 of the complaint?

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 100. Did you testify in the same affidavit that in some instances some booksellers have offered their services to deponent in order to secure the profits they might derive from sales to her, and to show their hostility to any attempt to control the whole trade?

A. I did.

Q. 101. Is that true as to the books mentioned in paragraph 9 of the complaint?

Mr. WISE: Same objection and request to the witness not to answer.

48 —. 102. Miss Kinnear, Macy & Co. advertise freely in the daily press, do they not?

A. They do.

Q. 103. (Handing witness paper.) I show you the "Sun" of Tuesday, April 19th, 1904, at page 12, and ask you whether that contains one of the advertisements of the defendants, R. H. Macy & Co.?

Mr. WISE: I object to that as irrelevant, immaterial and incom-

petent, it being a publication nearly a year and a quarter after the beginning of this action, and not being within the issues.

Mr. OLIN: I offer in evidence so much of the advertisement as related to books.

Mr. WISE: Objected to as irrelevant, immaterial and incompetent, and as much later than the issue in this action, and as having nothing to do with the issues in the action.

The paper referred to is marked "Complainants' Exhibit 3, of August 24th, 1904, J. A. S., Ex'r."

Mr. OLIN: I offer in evidence the advertisement from the "Sun" of December 6th, 1902, of which a copy is contained in the said papers on appeal, folios 206 to 212.

Mr. WISE: Same objection.

The advertisement referred to is marked "Complainants' Exhibit 4, of August 24th, 1904, J. A. S., Ex'r."

Mr. WISE: We admit that that appeared, and that the man in charge of the advertising of Macy & Co. put it in, but do not admit the truth.

Mr. OLIN: I also offer in evidence the advertisement from the "Times," of March 14th, 1902, found in said printed papers, folios 213 to 219.

Mr. WISE: Same objection as to that, also that all these advertisements were prior to the issue of the copyright on the books in this action.

The advertisement referred to is marked "Complainants' Exhibit 5, of August 24th, 1904, J. A. S., Ex'r."

Q. 104. I understand that in pursuance to the request of the defendants' counsel, you decline to tell me the source from
49 which you obtained any of the books mentioned in paragraph 9 of the complaint; is that true?

A. Absolutely.

Q. 105. I understand that you are able to tell me the source from which you obtained at least some of those books?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 106. I understand that there is no record kept by R. H. Macy & Co. of the source from which those books have come, and that all of them seem to have been sold to R. H. Macy & Co. by you?

A. All books published by members of the American Publishers' Association are sold to R. H. Macy & Co. by myself.

Q. 107. And there is no book or record in possession of R. H. Macy & Co. which will show from whom you obtained those books?

A. None whatever.

Q. 108. Is that true of other books than those affected by the rules of the association?

A. Yes.

Q. 109. Do you sell to R. H. Macy & Co. other books than those published by members of the American Publishers' Association?

A. I have just stated that all books published by the association are sold by me to R. H. Macy & Co.

Q. 110. How about other books not published by the American Publishers' Association?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent.

I will state upon the record, if you so wish, if that is what you are seeking, that R. H. Macy & Co. have no record from whom any of those books have been purchased, or the price at which they have been purchased.

Mr. OLIN: I am asking about other books.

Mr. WISE: As to other books, I object, as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 111. You decline to answer, then, whether this rule of purchasing books, published by members of the American Pub-
50 lishers' Association, from you, extends to other books not published by members of the American Publishers' Association?

A. I decline to answer.

Q. 112. And you decline to answer whether there is a record in the books of R. H. Macy & Co., showing the source from which they obtain books not published by members of the American Publishers' Association?

A. By the advice of my counsel, yes.

Q. 113. You decline to say what proportion of these books mentioned in paragraph 9 of the complaint were obtained from jobbers in the trade?

A. Yes, by the advice of my counsel.

Q. 114. You decline to say what proportion of them were obtained at retail?

A. Yes.

Q. 115. Will you tell me what proportion of the books sold by you consist of books published by members of the American Publishers' Association?

Mr. WISE: I object to that as irrelevant, immaterial and incompetent, and request the witness not to answer.

Q. 116. I explain to you that the object of the question is to ascertain how this business can be profitable, as you say it is, if a large part of the merchandise is sold at a loss, and I therefore ask it in explanation of statements made by you already?

Mr. WISE: I object to that, on the ground that it is irrelevant, immaterial and incompetent, that the statement so made was made in an affidavit of December 11th, 1902, and not as of the present time, and request the witness not to answer.

Q. 117. Miss Kinnear, I shall read from a paper annexed to your affidavit of 12th May, 1904, a list of names which I understand you state were black-listed for supplying R. H. May & Co.: Wm. Jackson, New York; Colonial Book Store, Boston, Mass.; New Bedford Dry Goods Co., New Bedford, Mass.; E. E. Baldwick, New York; N. Snellenberg & Co., Philadelphia, Pa.; Sherwood & Son, Meriden,

Conn; I. & M. Ottenheimer, Baltimore, Md.; Hunter &
51 Hunter, Detroit, Mich.; Owen Mines, 383 Fourth avenue, New York; is that a fact? That is, do you understand that those people were cut off for supplying R. H. Macy & Company?

A. I do.

E. LILLIAN KINNEAR.

Sworn and subscribed to before me this 15th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

Adjourned without date.

NEW YORK, *August* 25, 1904.

Met pursuant to adjournment.

Present: Counsel as before.

GEORGE S. EMORY, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name and occupation?

A. George S. Emory; vice-president of D. Appleton & Company.

Q. 2. Were you formerly connected with the American Publishers' Association?

A. Yes.

Q. 3. In what capacity?

A. Manager.

Q. 4. And for what period?

A. From March 1, 1901, to January 1, 1903.

Q. 5. What were your functions in a general way?

A. To carry out the plan of the association for the maintenance of net prices.

Q. 6. Did you have general knowledge of the affairs of the association and its transactions of every kind?

A. Yes.

Q. 7. During the time of your connection with the association was there any correspondence of any kind on the part of the association looking to fixed prices which the members of the association should charge for books published by them?

52 A. With the members of the association?

Q. 8. Yes.

Objected to as irrelevant, incompetent and immaterial.

Q. 9. Was there any action on the part of the association or any dealings on its behalf looking toward limiting the supply of books in any way to the public?

A. No.

Q. 10. Were steps taken to bring to the attention of the trade at large the regulations adopted by the association with regard to fixing prices?

A. Yes.

Objected to as irrelevant, incompetent and immaterial.

Q. 11. I show you a paper and ask you if you know what it is (hands witness paper)?

A. Yes, I do.

Q. 12. Were papers like that sent to anyone, and if so, to whom?

Objected to as irrelevant, incompetent and immaterial.

A. They were sent to the entire book trade of the United States according to lists which we had.

Mr. OLIN: I offer that in evidence.

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

The paper referred to was marked "Complainant's Exhibit No. 6, August 25, 1904."

Q. 13. That letter refers to an enclosure. Can you produce the enclosure that was sent with it?

A. That is the enclosure.

Mr. OLIN: I offer it.

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

The paper referred to was marked "Complainant's Exhibit No. 7, August 25, 1904."

Q. 14. Can you tell by the date when those two exhibits, 6 and 7, were sent to the trade generally?

53 Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

Mr. OLIN: When I say date I mean the periods.

A. Yes, sir; they were sent in March, 1901.

Mr. WISE: I object to the circular and the enclosure on the ground that they long antedate the action and copyright of the books set forth in the complaint.

Q. 15. When amendments were made to the rules of the association relating to fiction, was notice given to the trade?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial unless it is proven that it was sent to the defendants.

Q. 16. I show you a paper and ask you whether that circular was sent out, and, if so, to whom?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial, unless he specifies that it was sent to the defendant.

A. This was sent to the booksellers of the country, according to our list.

Q. 17. What was that list, was it a complete list so far as you know?

A. So far as I know, it was.

Q. 18. Was an effort made to make it complete?

A. Yes.

Q. 19. How was it compiled?

A. It was obtained from one of the members of the association, one of the publishing houses, which was a member of the association who used that list to circularize the trade as to the books.

Q. 20. Can you state in a general way how many names were on it; that is to say, hundreds or thousands?

A. I think in the neighborhood of 1,500.

Mr. OLIN: I offer the paper in evidence.

The WITNESS: There may have been more than that, but I am quite sure there were as many as 1,500.

54 Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

The paper referred to was marked "Complainant's Exhibit No. 8, August 25th, 1904."

Q. 21. Was a notice ever issued by the association relating to the firm of R. H. Macy & Company, and stating whether or not they were under-sellers?

A. Yes, there was.

Q. 22. Can you tell about when?

A. About the middle of May, 1901.

Q. 23. Have you a copy of that paper?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. I haven't it with me, but I think a copy is probably on file in the office of the association.

Mr. OLIN: I offer a copy of that notice in evidence, and when produced, it will be marked Exhibit No. 9.

Mr. WISE: I suppose that was a regular circular letter?

The WITNESS: I think not; I think it was a written letter, written on a typewriter. The particular letter notifying members and jobbers not to supply Macy & Company, that was not a printed letter, that was a letter written on a typewriter.

Q. 24. About when was that sent out?

A. About the middle of May, 1901.

Q. 25. Are you able to say whether it was a matter of general knowledge in the trade that Macy & Company were not keeping the prices as fixed by the rules of the association?

A. It was.

Cross-examination by Mr. WISE:

X Q. 26. Did you take part in the organization of the American Publishers' Association?

A. No.

X Q. 27. When did you first enter their employ?

A. On March 1, 1901.

55 X Q. 28. That was after the adoption of the resolution which has been introduced in evidence?

A. Yes.

X Q. 29. Your connection with the American Publishers' Association terminated on the 1st of January, 1903?

A. Yes.

X Q. 30. You have no knowledge then, no personal knowledge,

of any acts that transpired since that time, as far as the American Publishers' Association is concerned?

A. No.

X Q. 31. When you issued the circular cutting off Macy's book supplies, was that ever rescinded by you?

A. No.

X Q. 32. It remained in force?

A. Yes.

X Q. 33. And as far as you know it was obeyed by all the members of the Association?

A. Yes.

X Q. 34. Can you tell me how many members of the American Publishers' Association there are?

A. I cannot tell you now, no. There have been members, probably, taken in and dropped since I was associated with the association.

X Q. 35. At the time that notice was sent out I speak of?

A. In the neighborhood of twenty, I should say.

X Q. 36. How many are there now, do you know?

A. How many of those twenty?

X Q. 37. No, how many members are in the American Publishers' Association now?

A. I couldn't say exactly, I would estimate it in the neighborhood of 50, perhaps more or perhaps less.

X Q. 38. Is the majority of the publishing trade in that association at the present time?

A. Yes.

X Q. 39. Have you any knowledge of the American Booksellers' Association?

A. Yes.

X Q. 40. When was that organized?

A. I couldn't say exactly; it was a little prior to the organization of the Publishers' Association, I think.

56 X Q. 41. Prior to that?

A. I think so.

X Q. 42. Were they in any relation, business or otherwise, with the American Publishers' Association?

A. No.

X Q. 43. None at all?

A. No.

X Q. 44. Were the members of the Booksellers' Association under any agreement with the American Publishers' Association, as an association, I am now speaking of?

A. No, none.

X Q. 45. Were the members of the Booksellers' Association or any other members of the trade required to sign any papers or agreements with the American Publishers' Association as to the maintenance of the rules of the association?

A. In some cases, yes.

X Q. 46. Is it not a matter of fact that they were so required in all cases?

A. No, sir.

X Q. 47. In what cases were they not?

A. Why, a great many cases we didn't require them to sign any agreement, unless they were newcomers in the business. If we knew about them, and they had been observing the prices in conformity with the plan, we did not require them to sign any agreement, but *in case of any new dealer, we did sometimes.*

X Q. 48. Have you got a copy of that agreement?

A. I have not a copy, but there is one on file in the office of the Association.

X Q. 49. Is that the notice that we speak about (handing witness paper)?

A. That is the notice.

X Q. 50. That was only exacted from those traders who were new in the business?

A. Generally speaking, yes. If we had any doubts about any person, even though he had been in the trade before, we might ask him to sign one of those.

X Q. 51. It was assumed that the others would continue to abide by all the rules exacted by this pledge?

A. Yes.

57 X Q. 52. When there was any question about it, they were requested to sign this?

A. Yes.

X Q. 53. And if they refused, what occurred?

A. If they refused and cut prices, we would discontinue their supplies.

X Q. 54. If they refused and did not cut the prices, what occurred?

A. We did not discontinue.

X Q. 55. Would they continue to get books?

A. Yes.

X Q. 56. If they were asked to sign this notice and refused to sign it, the trade was still allowed to sell them, and would sell them?

A. Yes.

X Q. 57. Are you quite positive of that?

A. Yes.

X Q. 58. This was a mere matter of form, and unless the refusal was followed by the cutting of prices, it had no weight or effect?

A. No.

Mr. Wise: I offer it in evidence.

The paper referred to was marked "Defendant's Exhibit A, August 25, 1904."

X Q. 59. Mr. Emory, how did you receive notice of price cutting—from whom, as the usual rule?

A. From members of the trade.

Mr. Olin: I object to this as immaterial and irrelevant and I don't understand the purpose of it.

Mr. Wise: I am going to show the procedure of the Publishers' Association, in accordance with the circular, the steps they took to

cut off the supply, how they got their information, and how it was carried into effect.

A. (continued). From the members of the trade and advertisements.

X Q. 60. When you say members of the trade, do you mean members of the publishers' trade or members of the book trade?

A. Members of the book trade.

58 X Q. 61. Usually those members were members of the Booksellers' Association, as the ordinary rule?

A. No, I couldn't say as to that.

X Q. 62. You would not say whether they were or whether they were not?

A. No.

X Q. 63. When you received notice of a price cutter and determined to cut off his supply, what was the method that you employed?

A. After we determined to cut off his supply, we sent out the notice to the members.

X Q. 64. To the members of what?

A. The members of the Publishers' Association, and to the larger book dealers and to the jobbers.

X Q. 65. Did you send any such notice to the American Booksellers' Association?

A. No, sir.

X Q. 66. Were they informed as to the list of names that were cut off by your order?

Mr. OLIN: I object to — as incompetent, irrelevant and immaterial; unless the association was informed by the witness, he cannot know whether they were informed or not.

X Q. 67. You sent no circular to the association?

A. No.

X Q. 68. And no notice to their association?

A. No.

X Q. 69. And no dealer knew from you, except as you have stated, that the supply of any individual had been cut off?

A. No dealer knew from me?

X Q. 70. Yes.

A. You mean a bookseller in some part of the country?

X Q. 71. In the City of New York?

A. Unless we sent him notice to that effect.

X Q. 72. I asked you did you send a notice?

A. In some cases we did, yes.

X Q. 73. As far as R. H. Macy & Company were concerned, did you or did you not send notice throughout the book trade that they were not to be supplied with books?

59 A. The book trade of New York or the book trade of the country?

X Q. 74. The book trade of New York?

A. I don't think that we did.

X Q. 75. Are you sure that you did not?

A. No, I am not.

X Q. 76. Do you know as a matter of fact whether the Booksellers' Association published a list of names of dealers whose supplies had been cut off by the American Publishers' Association?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and as being no part of the issues as at present framed since the striking out of the second defense.

Mr. WISE: I offer the testimony for the purpose of impeaching the witness' testimony.

A. I have seen such a list.

X Q. 77. You know that they have been published regularly?

A. I don't know how regularly, but I have seen them at different times, and I think regularly for a time, yes.

X Q. 78. Is it not a matter of fact, Mr. Emory, that the Book and Newsdealer, issued monthly, contained a report of the secretary of the Booksellers' Association, and that in each case at the end of that report there was a list of dealers under the heading that their supplies had been cut off?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and as calling for the contents of a document having nothing to do with the issues as at present framed, and I advise the witness not to answer the question.

X Q. 79. You have stated, Mr. Emory, that you have occasionally seen that list: Will you state whether that list was intended on behalf of the American Publishers' Association as a notice to the wholesale and retail book trade that the dealers mentioned on that list had not obeyed the rules of the American Publishers' Association?

A. The American Publishers' Association had nothing to do with the preparation of that list.

60 Mr. WISE: I move to strike the answer out as not responsive.

X Q. 80. My question is not whether the American Publishers' Association had anything to do with that, but whether that list was published and intended to be published as a notice from the American Publishers' Association?

Mr. OLIN: I submit that the question was answered.

Mr. WISE: I press the question.

A. The American Publishers' Association had nothing to do with it whatever.

X Q. 81. When you say it had nothing to do with it whatever, do you mean the physical fact of publication?

A. Or had anything to do with the publication in any way.

X Q. 82. It had nothing to do with the furnishing of any of the names on it?

A. No, sir.

X Q. 83. Nor with the list?

A. No, sir.

X Q. 84. And had nothing to do with furnishing any to the Booksellers' Association?

A. Not formally, no.

X Q. 85. Did it do so informally?

A. No, not as a rule.

X Q. 86. Did it ever do so?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and because it has nothing to do with the issues as now framed and I advise the witness not to answer.

X Q. 87. You intend to say then that the lists published in the Book and Newsdealer, the organ of the American Booksellers' Association, under the title of "Secretary's Report," was not an official notice in any way connected with the American Publishers' Association?

A. Yes.

X Q. 88. And that it was not issued with their sanction?

A. Yes.

X Q. 89. Nor from information gathered from them?

A. Yes.

61 X Q. 90. When the publishers issued their notice that R. H. Macy & Co. had not complied with the rules and were not to be supplied with books, did they send that notice to any of the dealers outside of the State of New York?

A. Yes.

X Q. 91. They sent it pretty generally throughout the trade?

A. They sent it to the larger dealers and to the jobbers.

X Q. 92. As a consequence thereof, the larger jobbers did not do business with R. H. Macy & Company?

A. I suppose not.

X Q. 93. What steps were taken to ascertain the sources from which the Macys got their books by the American Publishers' Association?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and as being no part of the issues, and I advise the witness not to answer.

X Q. 94. The effect of that circular was intended to be the cutting off of Macy's book supply, was it not?

A. Yes.

X Q. 95. Do you know the plaintiff in this action?

A. Yes.

X Q. 96. Do you know whether they sell books at wholesale?

A. Yes.

X Q. 97. They do?

A. Yes.

X Q. 98. Do they sell books at retail?

A. Yes.

X Q. 99. Do they sell their own publications only at wholesale?

A. Yes.

X Q. 100. And do they sell their own publications only at retail?

A. No, they keep a regular book store.

X Q. 101. They keep a regular book store in which they sell books of all kinds?

A. Yes.

X Q. 102. And they sell, as far as you know, all books pursuant to the rules of the American Publishers' Association?

A. They do.

62 X Q. 103. Is the same true of a number of other firms that are members of the Publishers' Association?

A. It is true of a few.

X Q. 104. Can you mention one?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. Dodd, Mead & Company; Putnam; Little, Brown & Company, of Boston. Those are all that I think of just at the minute.

X Q. 105. Are any of the members of the American Publishers' Association members of the American Booksellers' Association?

Mr. OLIN: Objected to as immaterial and irrelevant, and there being no foundation for it, and it does not appear that the witness knows, and the witness is advised not to answer.

X Q. 106. Do you know the members of the American Publishers' Association?

A. Yes.

Mr. WISE: I now repeat the question before asked, whether any of the members of the American Publishers' Association are members of the American Booksellers' Association.

Mr. OLIN: I make the same objection, and the witness is advised not to answer.

X Q. 107. The reason why the Macy's were cut off from their supply of books was that they had undersold the publication of "Tarry Thou Till I Cor[illegible]"

A. I think there were other books at the same time; that was one of them.

X Q. 108. Was not the circular sent out in consequence of "Tarry Thou Till I Come" being undersold at Macy's?

A. Yes, partly. As I say, I think there were other books at the same time undersold.

X Q. 109. Was that not the direct cause of it, after they had refused to keep up the price of "Tarry Thou Till I Come"? Did you not go to see them and ask them to maintain the price?

A. Yes.

63 X Q. 110. And upon their refusal did you not then issue the circular?

A. Yes.

X Q. 111. So that it was directly in consequence of their refusal to maintain the price of "Tarry Thou Till I Come" that they were shut off from their supply of books?

A. As I say, I think there were other books at the same time that they were cutting, and they had announced their intention of cutting prices before.

X Q. 112. Was it directly in consequence of that book, after their

refusal to maintain the price on that particular book, that you sent out the notice?

A. Yes.

X Q. 113. Did the order of the Publishers' Association deprive the defendants, R. H. Macy & Company of the rights to purchase in the open market books copyrighted or uncopyrighted, or was that its purpose or intention?

Mr. OLIN: Objected to as immaterial and irrelevant and not within the issues, and as incompetent, and the witness is advised not to answer.

X Q. 114. Do you know that an action was brought in the State Courts to declare the combination of the American Publishers' Association and the American Booksellers' Association unlawful?

A. Yes.

X Q. 115. Do you know that the Court of Appeals of this State decided that in part, at least, their combination was unlawful?

Mr. OLIN: Objected to. The opinion of the Court of Appeals should be looked to for the decision.

X Q. 116. You are quite sure, Mr. Emory, that there was no agreement or combination of any kind between the American Booksellers' Association and the American Publishers' Association?

A. I am.

X Q. 117. Are you quite certain that the rules adopted by the American Publishers' Association were not adopted with the knowledge and with the consent of the American Booksellers' Association and after deliberation with them?

A. I don't know about that.

64 X Q. 118. Do you remember having made an affidavit on the 9th day of December, 1902, in the action brought in the New York Supreme Court by Isidore Straus and others against the American Publishers' Association and having attached thereto a circular issued by the American Publishers' Association?

A. I remember making an affidavit and attaching a circular.

X Q. 119. Do you recollect when that circular was issued?

A. No, I do not. I don't recall exactly what the circular was at this time.

X Q. 120. I will show it to you. Does that refresh your recollection?

A. Well, I don't remember the date of that, it was about the time of the formation of the Association.

X Q. 121. About that time?

A. Yes.

X Q. 122. Do you know by whom that was sent out?

A. I think it was sent out by the American Booksellers' Association.

X Q. 123. Do you know whether it was done with the approval of the American Publishers' Association?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. No, not that I know of.

X Q. 124. Do you know whether this statement therein contained was correct or incorrect:

"The reform measures which are to go into operation on the 1st of May, have been adopted by the American Publishers' Association and by the American Booksellers' Association, after careful and thoughtful deliberation, with a view to conserving the interests of authors and of the reading public as well as of booksellers and publishers, and we now ask the kind interest and co-operation of our patrons in our effort to restore the general book trade and the business of bookselling to the high character and honorable calling which it has enjoyed, to the great satisfaction of all concerned."

Mr. OLIN: Objected to as immaterial and irrelevant and I advise the witness not to answer.

X Q. 125. Do you know whether these resolutions were
65 adopted after deliberation by the American Publishers' Association and the American Booksellers' Association, after having read to you that paragraph from the circular attached to your affidavit?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent, and I advise the witness not to answer.

X Q. 126. I ask you whether this statement appearing in a circular issued on the 7th day of August, 1902, of the American Booksellers' Association is a true statement of the facts:

"By special arrangements entered into with the organization committee of the American Publishers' Association, the members of our association are bound not to buy, not to put in stock nor to offer for sale the books of any publishers who shall finally decline to cooperate with us in the maintainance of the net price system by joining the American Publishers' Association and issuing books under the net price system."

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and because it has nothing to do with the issues, and the American Booksellers' Association has nothing to do with the plaintiffs, nor is there any relation between them and the American Publishers' Association, and I advise the witness not to answer.

X Q. 127. I ask you whether this is a true statement of the facts as contained in the same circular letter of the American Booksellers' Association:

"Inasmuch as the publishers have carried out their part of the agreement upon which our contract was conditioned, it now becomes necessary for us to preserve our part of the agreement."

Is that statement as contained in that circular a statement of the fact?

Mr. OLIN: Objected to as incompetent, and not the proper way to examine a witness, to ask him if a statement in a circular about which he is not shown to have any knowledge, and with which he is not shown to have any connection, is a fact.

66 X Q. 128. I will ask you if that statement is true?

Mr. OLIN: I make the same objection, and I advise the witness not to answer.

X Q. 129. I will ask you if it is true that the publishers carried out the agreements upon which the conduct of the booksellers was conditioned?

Mr. OLIN: Objected to as immaterial, incompetent and irrelevant.

A. They had no agreement that I know of.

X Q. 130. Is it not a fact, Mr. Emory, that the American Booksellers' Association co-operated with the American Publishers' Association in the maintenance of the so-called net price system introduced by the various resolutions adopted since May, 1891?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. It depends a good deal on what you mean by co-operation. I don't know that they did, no.

X Q. 131. If you sent notice to the American News Company—is that concern a member of the Publishers' Association?

A. Yes.

X Q. 132. Are they also large wholesale dealers?

A. Yes.

X Q. 133. Do you know whether they are members of the Booksellers' Association?

A. I don't know.

X Q. 134. Is the Baker & Taylor Company a member of the American Publishers' Association?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. I think they are now.

X Q. 135. They are now?

A. Yes.

X Q. 136. Were they at the time you were manager?

A. I think they did come in, yes, the latter part of the time.

X Q. 137. Before the time that they became members of the American Publishers' Association, they were large wholesale dealers and jobbers in books in the City of New York?

A. Yes.

67 X Q. 138. Prior to their joining the Publishers' Association you sent them a notice not to sell to certain individuals?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. Yes.

X Q. 139. Do you know whether they obeyed?

A. I believe they did.

X Q. 140. That is the character of co-operation which I meant when I asked you the question before, did the large wholesale dealers, members of the American Booksellers' Association, co-operate with you either by furnishing you with notice of price cutting or by obeying your requests not to deal with the price cutters?

Mr. OLIN: Objected to as immaterial and irrelevant.

A. So far as the notice of price cutting was concerned, I may have been informed by individual members of the association or by members outside of the association. In fact, I have a distinct recollection that I was informed in different cases by both. So far as co-operation is concerned, there were members of the Booksellers' Association to whom, on certain occasions, we sent notices, and presumably they conformed to them as individuals.

X Q. 141. Do you not know as a matter of fact that the notices you sent out were very generally obeyed?

A. I believe they were.

X Q. 142. And do you not know as a matter of fact that until you had sent out notices that a certain individual was not to be supplied with books the trade in general did supply him with books, so that only after your notice was sent out did the trade at large refrain from dealing with the price cutters?

A. That is correct.

X Q. 143. And if a bookseller failed to obey, he was cut off, was he not?

A. The plan provides that.

X Q. 144. Well, as a matter of fact, I ask you if the plan was carried into effect?

A. Yes, the plan was carried into effect.

X Q. 145. And up to the year 1903, when your connection with the American Publishers' Association terminated, that plan was sought to be enforced to the fullest extent against R. H. Macy & Company?

A. Yes.

68 X Q. 146. Every effort was made to cut off their total supply of books, was it not?

A. Yes.

Redirect examination by Mr. OLIN:

R. D. Q. 147. Did I understand you to say in answer to a question of Mr. Wise that this agreement, Defendant's Exhibit A was intended to be a dead letter, or purely formal?

A. No, I did not intend to give that impression. When the association was first formed the plan was sent out with the letter, and the trade, as a rule, conformed with the terms of the plan. We found out afterwards that people were coming into the market that we knew nothing about, and we thought that it might be connected with the under-sellers in some way, and there were also houses which sold books only once a year, about Christmas time, and in order to insure their maintenance of the prices, we got this agreement signed.

By Mr. WISE:

X Q. 148. I understood you to say that they were not compelled to sign it, and that they still got books?

A. Such cases have happened, yes.

X Q. 149. I am not talking of exceptional cases, but the general rule. If such individuals as you have mentioned had not joined

the association or agreed to abide by the rules in the first instance, when they were asked to sign one of those papers, and refused to do so, was he, as a rule, supplied with books?

A. No, I think not, as a rule, but on the other hand there were very few objections; I remember one or two that we waived their disinclination to sign the agreement.

X Q. 150. It was not a dead letter as Mr. Olin suggested, but it was intended to compel the individuals purchasing books who had not already entered into some arrangement to become a party to it?

A. Yes, it was intended to insure the maintenance of prices on the part of those buyers, that is what it was for.

X Q. 151. In your direct testimony, you said that no attempt was made to limit the supply of books by the Publishers' Association. What do you mean by that?

69 A. There was no attempt made to limit the number or quantity of books that publishers should publish.

X Q. 152. But there was an attempt made to limit the supply of R. H. Macy & Company?

A. There was an attempt made to stop their supply, yes.

X Q. 153. When you say no attempt was made to limit the supply of books, you referred to the publishers being permitted to publish books?

A. Yes; I referred to his output.

X Q. 154. But you did not mean that he should not have a limit as to whom he would sell the books?

A. No, if he was a member of the association. No publisher was governed by the rules of the association unless he was a member.

X Q. 155. You did not interfere with the supply of any other publisher?

A. No.

By Mr. OLIN:

R. D. Q. 156. Did you at the time of this conversation with R. H. Macy & Company notify them that they could receive books freely in case they would not cut prices?

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

A. Yes.

R. D. Q. 157. What did they answer to that?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They said in effect that they would not agree to maintain prices.

R. D. Q. 158. The witness, Miss Kinnear, stated yesterday that certain persons were blacklisted for supplying R. H. Macy & Company as follows: William Jackson, New York; Colonial Book Store, Boston, Mass.; New Bedford Dry Goods Company, New Bedford, Mass.; E. E. Baldwick, New York; N. Snellenberg & Co., Philadelphia, Pa.; Sherwood & Son, Meriden, Conn.; I. & 70 M. Ottenheimer, Baltimore, Maryland; Hunter & Hunter, Detroit, Mich.; Owen Mines, 383 Fourth avenue, New York;

are you able to say whether the notice and circulars which you have stated were sent to the trade were sent to these persons whose names I have given?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, they were to most of them, anyhow. I do not refer to notices cutting off R. H. Macy & Company.

R. D. Q. 159. Are you able to say whether the notice not to supply R. H. Macy & Company was conveyed to those persons?

Mr. WISE: Objected to as irrelevant, incompetent and immaterial.

R. D. Q. 160. And that R. H. Macy & Company were cutting rates?

A. I don't think they were to most of them.

R. D. Q. 161. Were they notified before they were cut off in any way not to supply R. H. Macy & Company?

A. Some of them were.

GEO. S. EMORY.

Sworn and subscribed to before me this 18th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

RUDOLPH C. STOLLE, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name, residence and occupation?

A. Rudolph C. Stolle; I reside at 155 West 149th street, and I am second in the wholesale department of Charles Scribner's Sons.

Q. 2. How long have you been second in the wholesale department of Charles Scribner's Sons?

A. About fourteen years.

71 Q. 3. Are you fully acquainted with the method of doing business in that wholesale department?

A. I am.

Q. 4. And the transactions during the last four years in that department have came under your notice?

A. Yes.

Q. 5. They have been within your knowledge?

A. Yes.

Q. 6. Will you state the methods of selling books at wholesale in use by the complainant, Charles Scribner's Sons since the formation of the American Publishers' Association?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. A salesman goes, in most cases—that is to say, for stock orders, a salesman goes to a dealer and takes his order, and in other cases the dealer orders by mail or sends a messenger if he happens to be a New York dealer.

Q. 7. What has been done by the complainants with regard to

the rules as to net prices and discount allowed on fiction fixed by the rules of the American Publishers' Association?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They have printed a notice on the catalogue and on all the bill heads declaring that the books are sold only with the understanding that the purchaser shall abide by the rules of the association.

Q. 8. I show you the catalogue of Charles Scribner's Sons, publication for 1903, and call your attention to the notice on the first page. Has that appeared in all the catalogues of the house, a like notice?

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

A. All the general catalogues.

Mr. OLIN: I offer it.

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

72 The paper referred to was marked "Complainant's Exhibit No. 9, August 25, 1904."

Q. 9. Will you produce a bill head of the firm of Charles Scribner's Sons?

A. That is one.

Mr. OLIN: I offer it in evidence.

Mr. WISE: Does that come under the control of the witness, the bills?

The WITNESS: I superintend that part of it, yes.

Mr. WISE: I object to it as incompetent, irrelevant and immaterial.

The paper referred to was marked "Complainant's Exhibit No 10, August 25, 1904."

Q. 10. Are all the bills of Charles Scribner's Sons for dealings with the wholesale department rendered upon like bill heads?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. 11. Is any other method taken to bring the rules of the association to the notice of purchasers in the wholesale department?

Mr. WISE: Objected to as incompetent, immaterial and irrelevant.

A. Not by Charles Scribner's Sons.

Q. 12. When a new firm comes to deal with Charles Scribner's Sons that is unknown to you, what do you do?

Mr. WISE: Objected to as immaterial, incompetent and irrelevant.

A. We get what information we can as to their standing and whether or not they will be willing to maintain the rules of the

association by referring the matter to the association for investigation, or sometimes by sending them this blank which has been presented.

Q. 13. Do you refer to Defendant's Exhibit A?

A. Yes, sir.

73 Q. 14. Can you say whether or not these rules are, in one way or another, brought to the attention of every purchaser from the wholesale department?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 15. They are not brought to their notice?

A. Except in the way I have described, by the bill heads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases.

Q. 16. Have any sales been made by Charles Scribner's Sons since the adoption of those rules in their wholesale department except subject to those rules?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 15. They are not brought to their notice?

A. Except in the way I have described, by the bill heads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases.

Q. 16. Have any sales been made by Charles Scribner's Sons since the adoption of those rules in their wholesale department except subject to those rules?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 17. Does that apply to sales to jobbers and wholesalers?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. 18. And all persons purchasing by wholesale?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

74 Q. 19. Does the firm of Charles Scribner's Sons sell any of their copyright books to persons known to cut the net prices?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. 20. Or to any persons known to sell at a greater discount than 28 per cent. in cases of books of fiction?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They do not.

Q. 21. Has the firm of Charles Scribner's Sons, since the adoption of the rules of the Association sold at wholesale any of their copyright books to any person known to furnish books to rate cutters?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They have not.

Q. 22. Is the course of Charles Scribner's Sons in that respect fully known to the trade?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial, and on the ground that the witness cannot speak of his own knowledge.

A. Yes.

Q. 23. Is it fully known to dealers who purchase at wholesale copyright books from Charles Scribner's Sons?

Mr. WISE: I make the same objection.

A. I think it is.

Q. 24. Does what you have said about the method of selling books by Charles Scribner's Sons apply to copyright books mentioned in paragraph 9 of the complaint?

A. Yes.

Q. 25. Have any of those books been sold at wholesale by Charles Scribner's Sons except on the terms which you have mentioned, as to the rules of the American Publishers' Association?

75 Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. They have not.

Q. 26. Have they been sold at wholesale except with the bill head and notice such as have been put in evidence?

Mr. WISE: I object to it as immaterial, irrelevant and incompetent.

A. No, sir.

Q. 27. Referring to the list of books contained in paragraph 9 of the bill of complaint, which I have just shown you, are you able to say whether or not large numbers of those books have been printed and published?

A. Yes.

Q. 28. Numbers of volumes, counted by thousands?

A. Yes.

Q. 29. Is it possible for you to tell in all cases whether a book for sale in the open market has been sold by you at wholesale to one jobber or to another jobber?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. Any particular book?

Q. 30. Yes.

A. I don't know that I grasp the meaning of your question.

Q. 31. Is it easy or difficult for you to tell whether certain books on the counter of a retail dealer have been sold by you to one wholesale dealer or to another wholesale dealer or jobber?

A. In some cases they are marked.

Q. 32. But as a rule it is difficult for you to tell that?

A. Yes.

Q. 33. In any particular instance of underselling by a retailer is it easy or difficult to know what wholesaler received those books from you?

A. It is difficult unless it happens to be marked.

Cross-examination by Mr. Wise:

X Q. 34. Is it not a fact that Charles Scribner's Sons mark most of their books that they sell?

A. They do not.

76 X Q. 35. Can they without the identification mark tell who purchased the books in the first instance from them?

A. They cannot.

X Q. 36. It is not difficult, but it is impossible?

A. You are speaking of a particular volume?

X Q. 37. Yes, I am talking about a particular volume?

A. They cannot.

X Q. 38. You are sure that no sales were made by Charles Scribner's Sons to any retailer who did not maintain the net price of books since May, 1901?

A. Not after we were informed that they failed to maintain the price?

X Q. 39. Who informed you?

A. The American Publishers' Association.

X Q. 40. Did they inform you each time that a price cutter was discovered, or did they furnish you with a list?

A. They informed us each time.

X Q. 41. And they did not furnish you with a list of names?

A. They also furnished us with a list.

X Q. 42. Can you produce that list of names?

A. I cannot at the present time.

X Q. 43. Is it in your possession?

A. I have it in my office.

X Q. 44. Can you produce it here in Mr. Olin's office?

A. I can.

X Q. 45. In case you ascertain individually that a book published at a net price or a restricted price, were sold by a retailer at a lesser figure, did you stop selling to that individual, or did you wait until you got a notice to stop from the American Publishers' Association?

A. We stopped selling immediately.

X Q. 46. You are quite sure?

A. Yes.

X Q. 47. Without a notice?

A. Without a notice.

X Q. 48. Did you continue to stop selling them, cut them off from your list of customers?

A. No, we stopped selling them pending an investigation made by the association, and after the investigation was made, we generally received a report as to whether or not the price would be restored.

77 X Q. 49. Did you receive a notification from the American Publishers' Association whether the price was being restored, or whether the individual dealer could be dealt with again by you?

A. Yes.

X Q. 50. What was the notification?

A. A general notice that the individual dealers had given definite assurance that he would maintain prices in the future, and on the strength of such notice we again supplied books to that dealer.

X Q. 51. That is the invariable rule?

A. Yes, sir.

X Q. 52. It never was broken?

A. No, sir.

X Q. 53. Do you recall that the firm of Simpson, Crawford & Simpson, and the firm of Frederick Loeser & Company advertised and sold net books published by Scribner and others at less than the net price?

A. I do.

X Q. 54. Were they cut off?

A. Temporarily, yes.

X Q. 55. On what basis were they restored?

A. We received notice, as I remember it, from the association declaring that they had agreed or given sufficient assurance that they would restore the proper price.

X Q. 56. Did they?

A. They did to my knowledge, as far as I know.

X Q. 57. They did to your knowledge, as far as you know?

A. So far as I know.

X Q. 58. Is it not a fact that the American Publishers' Association permitted the sale of books by Charles Scribner's Sons to Frederick Loeser and to Simpson, Crawford & Simpson for specific periods at less than the net price at which those books were published, and that they were not punished for so doing?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Not until after they had given the assurance that I speak of.

X Q. 59. Is it not a fact that they cut the price with the
78 knowledge and consent of the American Publishers' Association, and that that was known to Charles Scribner's Sons?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I think so.

X Q. 60. Is it not a fact that you sell books to Siegel-Cooper & Company?

A. Yes.

X Q. 61. Is it not a fact that on every net price book sold by them they give a rebate?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I don't know of any rebate.

X Q. 62. Is it not a fact known to you that every book sold in the store of Siegel-Cooper & Company is sold at a discount practically approximating from three to seven per cent.?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Not to my knowledge.

X Q. 63. Do you know whether the firm of Siegel-Cooper & Company has a trading stamp system?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I do.

X Q. 64. Do you know that with each book bought in that store a trading stamp of sufficient quantity is given to make a reduction varying from three to seven per cent.?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I think so, but I have no definite knowledge.

X Q. 65. Has Siegel-Cooper & Company been cut off from their supply of books by the Publishers' Association or Charles Scribner's Sons?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

79 A. Not by Charles Scribner's Sons.

X Q. 66. Charles Scribner's Sons sold, and have continued to sell to Siegel-Cooper & Company the books mentioned in paragraph 9 of the complaint?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Yes.

X Q. 67. They have bought them in large quantities?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Yes.

X Q. 68. Has Siegel-Cooper & Company been cut off from their supply of books by any other publishing house?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. Not to my knowledge.

X Q. 69. They are considered in good standing?

A. Yes, sir.

X Q. 70. Does the same statement apply with all the department stores that conduct retail book stores and issue trading stamps?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. Yes, I think so.

X Q. 71. Can you tell me whether special firms were permitted to cut the prices of net books, or restricted price of books in order to meet the competition of R. H. Macy & Company?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. No, sir.

X Q. 72. You have no such knowledge?

A. No, sir.

X Q. 73. Do you know whether any such permission was given to any department store where a neighboring or rival department store had refused to join or had cut the price?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I do not.

80 X Q. 74. Are you aware that for a period of something like three months Frederick Loeser & Company were permitted to cut the price of all copyrighted books?

A. No, sir.

X Q. 75. For how long a period was it?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. My recollection of that was that it applied to books that did not come under the rule.

X Q. 76. What books?

A. Why books not restricted in price.

X Q. 77. What interference could the association have as to books not restricted in price?

A. My recollection is that we supplied some books of that character at a special discount.

X Q. 78. Books of what character?

A. Books that did not come under the rules of their association.

X Q. 79. Then you sold your own books which did not come under the rules of the association?

A. I think we sold a few items at a special price.

X Q. 80. Can you state which ones?

A. I cannot.

X Q. 81. Do you follow the advertisements of the great department stores, especially when they are accused of cutting prices?

A. I don't follow them; I see them occasionally.

X Q. 82. Do you know the book "Gordon Keith," written by Thomas Nelson Page, published by your house?

A. Yes, sir.

X Q. 83. Was that published at a net price?

A. No, sir.

X Q. 84. At a restricted price?

A. Restricted price.

X Q. 85. What was that price?

A. The understanding was that no dealer should sell it at less than 28 per cent. at retail.

X Q. 86. 28 per cent. from what?

A. $1.50.

81 X Q. 87. Which would make it $1.08?

A. Yes, or 33 1/3 when supplied to a library.

X Q. 88. Do you not know that the book "Gordon Keith" was sold freely and without any interference on the part of the association by Frederick Loeser & Company of Brooklyn during the periods of restriction according to the terms of your circular at 79 cents per copy?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. I do not.

X Q. 89. Do you know whether it was sold or not at a less price?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. With our consent, you mean?

X Q. 90. I didn't ask you that. I asked you whether you knew it was sold by Frederick Loeser & Company, of Brooklyn?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I do not.

X Q. 91. Do you know whether it was sold by anybody else outside of R. H. Macy & Company?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I know of no such case, no.

X Q. 92. Do you know whether it was sold by Simpson, Crawford & Simpson?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I think it is possible, but I couldn't say definitely.

X Q. 93. If it was done, were they cut off from their supply of books by you without warning from the Publishers' Association?

A. They were.

82 X Q. 94. You are positive of that?

A. They were temporarily cut off, yes.

X Q. 95. They were restored when?

A. As I remember it, it was a short time afterwards, when they had given the proper assurances to the association.

X Q. 96. What were the proper assurances?

Mr. OLIN: Objected to as immaterial, irrelevant and incompetent, and because there is no foundation for the question.

A. I mean whey they had given satisfactory promises.

X Q. 97. Promise of what?

Mr. OLIN: Objected to as irrelevant, incompetent and immaterial.

A. To restore and maintain prices in accordance with the rules of the association.

X Q. 98. Are you sure that was the promise that was exacted?

Mr. OLIN: Objected to as irrelevant, immaterial and incompetent.

A. I cannot testify to that, no.

X Q. 99. All you know is that they were restored by the American Publishers' Association, and that you did not know what the ground of restoration was?

A. I was informed that it was on that ground.

X Q. 100. By whom?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. I think it came by notice from the association.

X Q. 101. That they had been restored?

Mr. OLIN: Objected to as irrelevant and immaterial.

A. I can't state definitely just how it happened. I think it came through the association.

X Q. 102. You don't know what pledges they gave further than you assume that they gave some pledge?

A. I do not.

83 The witness coming in this day to read over and sign his deposition says he wishes to correct his answers to X Q. 58 by saying: "It is not" and to X Q. 59 by saying "No."

RUDOLPH C. STOLLE.

Sworn to before me this 19th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

GEORGE W. HARPER, JR., a witness called in behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name and occupation?

A. George W. Harper, Jr., and I am a law student.

Q. 2. You have been in the office of the complainant's solicitor for some years, have you not?

A. I have, yes, sir.

Q. 3. On Saturday, November 7, 1903, did you go to the book department of R. H. Macy & Company?

A. Approximately at that time, I did.

Q. 4. Did you see any of the books which are mentioned in this complaint?

A. I did, a number of them.

Q. 5. Can you tell which you saw there?

A. I was in the store on various occasions and I noticed different books at different times. I recall seeing "Little Shepherd of Kingdom Come," and "Gordon Keith."

Q. 6. How many volumes of "Little Shepherd of Kingdom Come" did you see approximately?

Mr. WISE: Objected to as incompetent. We acknowledge that we sold them freely.

Mr. OLIN: Will you concede that you sold them by hundreds?

Mr. WISE: No, because we have not.

A. As a conservative estimate there were 400 copies of "Little Shepherd of Kingdom Come" on sale there at one time.

Q. 7. Did you notice any signs in the store at the time you were there?

84 A. Yes, I did, and I made copies of a number of them.

Q. 8. Can you produce copies of those signs?

A. Yes. This is an affidavit to which I swore giving the copy of three signs that I had made of them that day.

Q. 9. Read the signs?

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

A. "The book trade has not yet driven us out of business. We sell books cheaper than any other house." Another sign read "All net books sold ten per cent. less than other houses." The word "net" is in parenthesis. The third sign read "All new fiction 98 cents sold elsewhere $1.08."

Mr OLIN: That is all.

Mr. WISE: I have no questions.

GEORGE W. HARPER, JR.

Sworn and subscribed to before me this 20th day of October, 1904.

JOHN A. SHIELDS, *Examiner.*

FERNAND C. J. TESSARO, a witness called on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. OLIN:

Q. 1. What is your name and residence?

A. Fernand C. J. Tessaro; 510 Schenck avenue, Brooklyn.

Q. 2. You are manager of the American Publishers' Association, are you not?

A. I am.

Q. 3. How long have you been such?

A. Since October, 1903.

Q. 4. Have R. H. Macy & Co. been restored to the list of people to whom members of the association can freely sell books?

A. They have not.

Mr. WISE: Objected to as incompetent, irrelevant and immaterial.

85 Q. 5. Has the association authorized the sale of copyright books to any person known to cut rates?

A. No, sir.

Mr. WISE: I presume that is from the time which he took charge?

Mr. OLIN: Yes, I merely ask him as from the time that he took charge.

Cross-examination by Mr. WISE:

X Q. 6. Mr. Tessaro, do you know whether the association has permitted the sale of books, copyright books, to Siegel-Cooper & Company?

A. Yes, sir.

X Q. 7. Do you know that the Siegel-Cooper Company issues trading stamps with each net book sold by them?

A. They do not issue the trading stamps with net books except when trading stamps are asked for.

X Q. 8. Do you know that any individual that purchases a net book can obtain a trading stamp?

A. If they ask for them, yes, sir.

X Q. 9. And do you know that the trading stamps constitute a discount varying from 3 to 7 per cent. on such net books?

A. No, sir, I do not.

X Q. 10. Do you know that it constitutes any discount?

A. I do not.

X Q. 11. The trading stamp has no value?

A. Not that I know of.

X Q. 12. None at all?

A. Not that I know of.

F. C. J. TESSARO.

Sworn and subscribed to before me this 18th day of October, 1904.
JOHN A. SHIELDS, *Examiner.*

86 & 87 Circuit Court of the United States, Southern District of New York.

CHARLES SCRIBNER ET AL.
vs.
ISIDOR STRAUS ET AL.

In Equity.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, an examiner, duly appointed by the Circuit Court of the United States for the Southern District of New York do hereby certify, that the foregoing are the proofs for final hearing taken before me in the above entitled cause on the part of the complainants under and pursuant to the 67th Rule of the Supreme Court of the United States as amended.

I do hereby further certify, that I am not of counsel nor attorney for either of the parties, nor in any wise interested in the event of the said cause.

I further certify, that Mr. Stephen H. Olin appeared on the part of complainants and Mr. Edward E. Wise appeared on the part of defendants in the taking of said proofs.

JOHN H. SHIELDS, *Examiner.*

88 "COMPLAINANT'S EX. 1, AUG. 24, '04, J. A. S., EX'R."

American Publishers' Association.

Office of the Secretary, No. 66 Fifth Avenue,

NEW YORK, *October* 1*st* 1900.

Dear Sirs: In order to learn the views of Booksellers upon the question of prices and discounts, the American Publishers' Association would be glad to receive replies from the trade to the questions which follow, and it is requested that you answer them as fully as seems best to you. The Association desires to proceed in a conservative manner and to create as little disturbance as possible. Such books as would be subject to the rules of the Association to be adopted would, of course, be protected by copyright, and the rates would apply only on books issued after a fixed date, to be agreed upon.

1. Would a system of absolute net prices, to be maintained throughout the country, be satisfactory to you?

2. Should all new copyright books be issued in this manner, at net prices, or in the beginning would it be better to make only certain classes of books—such as perhaps the more serious books—net, leaving novels and some other popular classes to be issued at regular retail prices as at present?

3. In case such a system of net prices is adopted, would it, in your opinion, be possible to absolutely guarantee this price to every purchaser of the book at retail, whether belonging to the clergy, professional, or other class hitherto specially favored in the matter of discount (the only exception being in the case of libraries)?

4. If the publishers should exact postage upon books sent by mail, would this give the bookseller all the protection he could fairly demand against direct supply from the publisher?

5. Will you kindly say whether in your opinion a discount should be made to libraries, and, if made, whether 10 per cent. is enough for the purpose?

6. From the net prices as indicated above it is suggested that to *bona fide* booksellers carrying a stock of books a general dis-
89 count of 25 per cent. be allowed, some shorter discount than this being allowed to all other dealers in books, provided, of course, that the price is never cut. Would this discount plan be satisfactory to you, and is the discount offered, in your opinion, sufficient for books that are sold to the public at the net prices?

Extra discounts would be offered for quantity purchases, but for quantity purchases only, and with a view to making the purchaser of the larger quantity insure himself a larger profit for his speculation.

7. Would you keep in stock such net books, the prices of which were maintained, so long as these books were reasonably in demand?

8. Would you agree absolutely to maintain such net prices, and would you agree in case the prices of such books were cut, not to

cut them in return, but to present the evidence to the Publishers' Association of such cutting of rates and allow the Publishers' Association thirty days in which to remedy the evil (*i. e.*, the aforesaid cutting of prices) before cutting prices in rebuttal?

9. No penalty can probably be attached to the breaking of prices, excepting that the publishers will sell to dealers who break the prices of these net books only at the net price and without discount, and all booksellers will be asked to agree to a similar provision, viz., that they will not sell to dealers who cut prices except at the regular list prices without discount. Do you think this provision would be sufficient to prevent the cutting of prices, and would you agree not to sell to dealers except at the list price if you were informed by the Publishers' Association of any dealer so accused of cutting the prices?

10. Are you willing to join a Booksellers' Association, with nominal dues, which shall undertake through its committees to inform the Publishers' Association in regard to cases where the price of any book is cut, the Booksellers' Association, if formed, to pay the expense of its own committees for the collection of such evidence in all cases where requested to do so by the Publishers' Association?

90 *While it may appear that the questions as outlined above indicate a certain policy to be followed possibly by the American Publishers' Association, I am instructed to say that the direction of such action is not yet determined and if therefore you should desire to outline a policy for the conduct of the business looking to the control of prices in some way or other, whether by the limitation of discount or otherwise, that would in your opinion answer the purpose (viz., the improvement of the conditions of the retail book trade) the Association would be most glad to have such outline of a plan from you and will give it due consideration before taking action in the matter.*

An early reply is respectfully requested and a full answer to each question by referring to it by number particularly desired.

Yours respectfully, GEORGE P. BRETT,
Secretary, American Publishers' Association.

"COMPLAINANT'S EX. 2, AUG. 24, '04, J. A. S., EX'R."

The American Publishers' Association, 156 Fifth Avenue, New York.

The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

I. That the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published

by subscription and not through the trade, and such other books as are not sold through the trade.

II. It is recommended that the Retail Price of a net book, Marked NET, be printed on a paper wrapper covering the book.

91 III. That the Members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carry stock of them for public sale.

IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than ten per cent.

Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount.

V. That the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VI. That after the expiration of a year from the publication of any such net copyrighted book, dealers shall not be held to the above restrictions and may sell such book at a cut price, but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so re-sold to him on demand.

VII. That when the publisher sells at retail a book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

VIII. That for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all

92 cases of cutting reported, and when directed shall send out notices to the Association, jobbers, and the trade, or any person violating the above provisions.

IX. That it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

X. That the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which association shall be to assist the Publishers' Association in maintaining prices on net

books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XI. That the Report when adopted by the Board of Directors be submitted to the Association and voted upon in accordance with the Association's Rules, Article II, Section 1.

"COMPLAINANT'S EX. 3, AUG. 24, '04, J. A. S., EX'R."

The Sun, Tuesday, April 19, 1904.

R. H. Macy & Co.'s Attractions Are Their Low Prices.

MACY'S

B'way at 6th Av. 34th to 35th St.

$1.08 Books at 98c.

Publications You Cannot Buy Elsewhere Under Trust Prices.

Main Fl., rear.

All other dealers, under pressure of a compact with the Book Trust, are forced to charge $1.08—no less—for late publications. Our price is 98c.—and this is one bit of evidence to support the claim that on everything else we sell our prices are lower than others ask for equal qualities. Some amusing squirming is done by the Trust-tied dealers in explaining the price difference.

93 Sir Mortimer, by Mary Johnston.
The Deliverance, by E. Glasgow.
Little Shepherd of Kingdom Come, by J. Fox, Jr.
Order No. 11, by Stanley.
Tomaso's Fortune, by Seton Merriam.
The Yoke, by Elizabeth Miller.
He That Eateth Bread With Me, by M. Keyes.
Shutters of Silence, by Burgin.
My Friend Prospero, by Harland.
The Yellow Van, by Whiteing.
The Long Night, by Weyman.
Hesper, by H. Garland.
Forest Hearth, by C. Major.
The One Woman, by Dixon, Jr.
The Peril of the Sword, by Harcourt.
Proud Prince, by McCarthy.
98c

Rebecca, by Wiggin..... 86c
Stone of Destiny, Mackay..... 86c
Richard Baxter, by F. Jones..... 69c

"COMPLAINANT'S EX. 4, AUG. 24, '04, J. A. S., EX'R."

Sun, Dec. 6th, 1902.

R. H. Macy & Co.'s Attractions Are Their Low Prices.

MACY'S

B'way at 6th Av. 34th to 35th St.

During the week preceding Christmas the store will close at the usual hour, 6 o'clock.

Removed to BROADWAY at SIXTH AVE. 34th to 35th St.

While we have the largest and probably the best equipped building in the world devoted to retailing, our chief attractions will continue to be as they have been in the past—OUR LOW PRICES AND RELIABLE QUALITIES.
THE OLD STORE AT 14TH STREET AND 6th AVENUE IS CLOSED.

94 Books.

Thanks to the publishers for tying competitors "hand and foot," even if they do offer balm to the tied ones *by refusing to sell us.* We particularly enjoy the opportunity of being able to have this illustration made with merchandise on which the "difference-of-quality" expedient cannot be utilized as an excuse for higher prices.

THE TRUST HAS THE PLEDGE OF ALL OTHER DEALERS NOT TO SELL THE FOLLOWING POPULAR BOOKS FOR LESS THAN $1.08.

Our Price 98c. Our Price.

Gabriel Tolliver—C. Harris.
The Splendid Idle Forties—Atherton.
Love and the Soul Hunters—Hobbes.
The Spenders—Wilson.
The Loom of Life—Gross.
Temporal Power—M. Corelli.
Richard Gordon—Alexander Black.
Hope Loring—L. Bell.
Donovan Pasha—Gilbert Parker.
The Two Vanrevels—B. Tarkington.
The Shadow of the Rope—Hornung.
The Vultures—Merriman.

A Girl Who Wrote—Alan Dale.
A Song of a Single Note—A. Barr.
The Mississippi Bubble—Hough.
The Leopard's Spots—Dixon.
Whom the Gods Destroyed—Daskam.
Paul Kelver—Jerome K. Jerome.
The Red House—Nesbit.
Winslow Plain—Greene.
The Fortunes of Oliver Horn—H. Smith.
A Speckled Bird—A. Evans.
The Long Straight Road—Horton.
Blue Flowers—Van Dyke.
Captain Macklin—R. H. Davis.
The Banner of Blue—Crockett.
Wolfville Nights—Lewis.
95 The Climax—Pidgin.
Fuel of Fire—Thorneycroft.
Istar of Babylon—Potter.
Moths and Rust—Cholmondeley.
Lizette—Marshall.
Miss Petticoats—Tilton.
The Double-barrelled Detective Story—Mark Twain.

The Cromptons—Mary J. Holmes, sold elsewhere at 75c.; our price 68c.

Glengarry School Days—R. Connor, sold elsewhere at 90c.; our price 84c.

New France and New England, sold elsewhere at $1.75; our price $1.49.

Border Fights and Fighters—Brady, sold elsewhere at $1.30; our price $1.17.

Hound of the Baskervilles—Doyle, sold elsewhere at 90c.; our price 79c.

However, books do not convey a just notion of the economy of the Macy prices in general, as compared to other stores. On other lines—the ones more difficult for inexperienced people to judge of qualities—the price differences in our favor are much greater. Sometimes we are half less than competition. Call it a quarter and you strike a fair average. 1st Floor, Rear.

"COMPLAINANT'S EXHIBIT 5, AUG. 24, '04, J. A. S., EX'R."

Times, March 14th, 1902.

R. H. Macy & Co.'s Attractions Are Their Low Prices.

MACY'S

Both Sides 14th St. from 13th to 15th, 6th Ave.

We sell more goods at retail for cash than any other store in America.

READ THIS, EVERYBODY.

Competitors—when continually undersold—indulge in unfair and absurd claims. The readiest subterfuge is an attempt to disparage our qualities. When confronted with the fact that
96 our prices are lower than theirs, they invariably try to explain the beat by attacking the character of our goods. How about Books? We use them to illustrate, because you *know* Books. They silence criticism. Our rates range from 10c. to $1.50 less than others ask for the same Books. We save you much more on other lines.

Audrey, by Mary Johnston, Author of To Have and To Hold ..... 91c.

The Methods of Lady Walderhurst, by Mrs. Burnett, at ..... 81c.

COMPLAINANT'S EX. 6, AUG. 25, 1904.

AMERICAN PUBLISHERS' ASSOCIATION.

Directors.

Charles Scribner, President.

A. C. McClurg, 1st Vice-Pres.
George H. Mifflin, 2d Vice-Pres.
Daniel Appleton.
Frank H. Scott.
G. B. M. Harvey, Treasurer.
George B. Brett, Secretary.
Frank H. Dodd.
Craige Lippincott.

George S. Emory, Manager.

156 Fifth Avenue, New York.
Telephone 3846 Eighteenth St.

To the Trade:

You are doubtless aware that the American Publishers' Association has been for some months engaged in formulating the details of a

plan to correct some of the evils connected with the cutting of prices on copyright books. The result of this work will be found in the enclosed circular, which is being sent to the entire book trade of the United States.

It may be urged by some that this plan is not as far-reaching as might be desired. This ground may be well taken, but after carefully considering all the conditions we are convinced that to attempt to do more at this time would seriously endanger the success of the whole movement.

We think that the circular will make clear the conditions of sale of copyright books published after May 1st, 1901. Should there be any doubt on any subject, inquiries can be made of the
97 undersigned. Additional copies of the circular may also be obtained from him on request.

It is a fact generally accepted by the publishing and book selling trades that the fixing of retail prices is highly desirable, and we hope that this first organized attempt in the United States to accomplish this end will receive the earnest support of all jobbers and retailers.

Trusting that we shall hear from you in approval of the adopted plan, we beg leave to remain,

Yours very truly,

AMERICAN PUBLISHERS' ASSOCIATION.
GEORGE S. EMORY, *Manager.*

COMPLAINANT'S EX. NO. 7, AUG. 25, 1904.

The American Publishers' Association, 156 Fifth Avenue, New York.

The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

I. That the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided however that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

II. It is recommended that the Retail Price of a net book, marked *Net*, be printed on a paper wrapper covering the book.

III. That the Members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers
98 and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations

as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books carries stock of them for public sale.

IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than ten per cent.

Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount.

V. That the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher.

VI. That after the expiration of a year from the publication of any such net copyrighted book, dealers shall not be held to the above restrictions and may sell such book at a cut price, but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so resold to him on demand.

VII. That when the publisher sells at retail a book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

VIII. That for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

IX. That it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

99 X. That the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XI. That the Report when adopted by the Board of Directors be submitted to the Association and voted upon in accordance with the Association's Rules, Article II, Section I.

COMPLAINANT'S EX. No. 8, AUG. 25, 1904.

American Publishers' Association.

Directors.

Charles Scribner, President.

Frank H. Dodd, 1st Vice-Pres.	G. B. M. Harvey, Treasurer.
George H. Mifflin, 2d Vice-Pres.	George P. Brett, Secretary.
Daniel Appleton.	Craig Lippincott.
Frank H. Scott.	W. F. Zimmerman.

George S. Emory, Manager.

156 Fifth Avenue.
Telephone, 3846 Eighteenth St.

NEW YORK, *June* 3, 1902.

To the Trade:

We beg leave to announce that, in compliance with the expressed wish of many important members of the trade, and to extend the protection to the price of fiction provided by the rules, the amendment printed below in bold-face type was adopted at a meeting of the American Publishers' Association held May 27th, 1902.

The rule covering fiction now reads as follows:

IV. That the members of the Association agree that on
100 all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be twenty-eight per cent., and all the rules for the protection of net books shall apply to the protection of fiction to this extent.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

When a work of fiction published under this rule is sent postpaid the price to the purchaser shall be not less than the minimum price plus the postage.

The above amendment takes effect immediately, and applies to all sellers of books.

We beg leave to again extend congratulations to the trade on the general satisfaction attending the operation of the protected price principle, and the firm foothold it has secured during the past year.

Yours very truly,

AMERICAN PUBLISHERS' ASSOCIATION.
GEORGE S. EMORY, *Manager.*

101 COMPLAINANT'S EXHIBIT No. 9, AUG. 25, 1904.

Charles Scribner's Sons'

Catalogue of
Publications.

All Books sent Postpaid except where Postage is Indicated.

Note to the Trade:

Copyrighted Net books published after May 1st, 1901, and copyrighted fiction published after February 1st, 1902, are sold on condition that prices be maintained, as provided by the Regulations of The American Publishers' Association. On such books the month of publication is given except where the book is announced as In Press.

Books starred are mostly Educational and are subject to a slightly different discount to the Trade than other Net books.

COMPLAINANT'S EX. No. 9, AUG. 25, '04.

American Publishers' Association.

Directors.

Charles Scribner, President.
A. C. McClurg, 1st Vice-Prest.
George H. Mifflin, 2d Vice-Pres.
Daniel Appleton.
Frank H. Scott.
G. B. M. Harvey, Treasurer.
George B. Brett, Secretary.
Frank H. Dodd.
Craige Lippincott.

George S. Emory, Manager.

156 Fifth Ave.
Telephone, 3846 Eighteenth St.

NEW YORK, *May* 8, 1901.

GENTLEMEN: Messrs. R. H. Macy & Company of New York having cut the retail price of a net copyrighted book and refuse to restore it until further advice, you will please decline to supply them with any of your publications as provided in the rules of the American Publishers' Association.

Yours very truly,

GEORGE S. EMORY, *Manager.*

102 American Publishers' Association.

Directors.

Charles Scribner, President.
A. C. McClurg, 1st Vice-Pres.
George H. Mifflin, 2d Vice-Pres.
Daniel Appleton.
Frank H. Scott.
G. B. M. Harvey, Treasurer.
George B. Brett, Secretary.
Frank H. Dodd.
Craige Lippincott.

George S. Emory, Manager.

156 Fifth Avenue.
Telephone, 3846 Eighteenth St.

NEW YORK, *May* 8, 1901.

GENTLEMEN: I beg leave to advise you that Messrs. R. H. Macy & Company of New York have cut the retail price of a net copyrighted book and refuse to restore it. In consequence of this will you please decline to supply them with any book published by members of the American Publishers' Association, a list of which is enclosed herewith.

Yours very truly,

GEORGE S. EMORY, *Manager.*

103 COMPLAINANT'S EX. NO. 10, AUG. 25, '04.

All Claims for Allowance must be made within five days after receipt of Goods—Not Responsible for Books ordered sent by Mail, or sent out to be Packed.

153-157 Fifth Avenue,
Between 21st & 22nd Streets,
NEW YORK.....190

M.....
Folio..... .....

Bought of Charles Scribner's Sons,
Publishers, Importers and Booksellers.

Terms:—Net Cash. Payable with Exchange on New York.

Sent per.....

Copyrighted Net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association.

DEFENDANT'S EX. A, AUG. 25, '04.

American Publishers' Association.

.....190..

In consideration of discount allowed on books bought from .....we hereby agree that for one year from date of publication we will not sell *net* books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1st, 1902, at a greater discount than 28 per cent. at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers' Association to any dealer known to us to cut prices of *net* books or of new fiction except as above provided.

104 Circuit Court of the United States, Southern District of New York.

In Equity. No. 8583.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, Trading as Charles Scribner's Sons,

v.

ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy and Company.

In Equity. No. 8936.

CHARLES SCRIBNER'S SONS, Incorporated,

v.

ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy and Company.

Suits in equity to restrain defendants from infringing complainants' copyrights for books by selling copyrighted books at retail, without a license from complainants, at a lower price than fixed and not maintaining retail prices as provided by the regulations of the American Publishers' Association. Also to restrain defendants from contributory infringement of such copyrights by inducing wholesale dealers and jobbers in such books to violate their agreements
105 with complainants as to the sale of copyright books.

The defendants deny infringement in any sense. Deny that complainants have proved a cause of action. Allege that complainants parted with title to all books the defendants have pur-

chased and sold and that being their property they had the right to sell them at such price as they saw fit to fix.

STEPHEN H. OLIN, AND
OLIN, CLARK & PHELPS,
For Complainants.
SPIEGELBERG & WISE,
With JOHN G. CARLISLE AND
EDMOND E. WISE,
Of Counsel,
For Defendants.

RAY, *District Judge:*

In the first action, No. 8583, the alleged limitation on the right to sell books at retail at less than a fixed price expired before the final hearing, hence no injunction, only an accounting could be granted in that case. The parties to that suit all reside in the State of New York. There is no diversity of citizenship.

In the second suit, No. 8936, the limited time had not expired and, as defendants had incorporated under the laws of New Jersey before bringing the action, there exists in such action diversity of citizenship.

If there is no infringement of a copyright shown in such first action, No. 8583, it must be dismissed. In the second action, if defendants are violating complainant's rights and a cause of action is shown and the amount involved is sufficient, the action may be sustained, even if infringement of a copyright is not shown. In this action the complainants not only allege infringement of their copyrights, but allege that they have valid contracts for the sale of their copyrighted books with certain parties which are or were
106 being carried out by them and that defendants wrongfully, etc., have induced and are inducing such parties to violate such contracts by false representations and other acts to the great injury of the complainants' business. They set forth certain facts tending to show grounds for equitable relief and an injunction.

The complainant is the owner of a large number of copyrights and is a publisher. It publishes and puts on the market its copyrighted books, but asserts that it puts them on the market under certain limitations and restrictions which attach to the books and the right to sell in the hands of all persons having notice of such restriction. The complainants are members of an association known as the American Publishers' Association. This associ-tion has made certain rules as to the purchase and sale by publishers and dealers of copyrighted books. These rules are attached to the complaint and set out in full in the opinion of this Court in the case of The Bobbs-Merrill Company against these same defendants, just decided, but not yet reported. In that case, while the facts were somewhat different, the questions of law involved here were extensively discussed.

Paragraph three of those rules provides as follows:

"That the Members of the Association agree that such net copyrighted books, and all others of their books, shall be sold by them to those booksellers only who will maintain the retail price of such net

copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the Association as one who cuts such prices, or who fails to abide by
107 such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided."

The complainants in their attempt to live up to these rules of this association, and to enforce them against others, and these defendants, and to maintain the fixed retail price of books sold in the retail trade, and to exclude from the business of selling their publications or the publications of any other publisher of books (copyrighted publications), those who will not observe such rules, have fixed the retail price of their copyrighted books and adopted the following method of selling, viz.: for stock orders a salesman in most instances goes to a dealer and takes his order, or the dealer orders by mail, or, if a New York City dealer is purchasing he sends a messenger. As to notifying dealers, purchasers, of the rules as to net prices and discount on fiction, fixed by the rules of such association, the complainants print a notice on their catalogues and on their billheads, reading as follows on catalogues:

"Charles Scribner's Sons" Catalogue of Publications.

All Books sent Postpaid except where Postage is Indicated.

Note to the Trade:

Copyrighted Net books published after May 1st, 1901, and copyrighted fiction published after February 1st, 1902, are sold on condition that prices be maintained, as provided by the Regulations of The American Publishers' Association. On such books the month of publication is given, except where the book is announced as In Press.

Books starred are mostly Educational and are subject to a slightly different discount to the Trade than other Net Books."

108 On bill heads:

"All claims for allowance must be made within five days after receipt of goods—not responsible for books ordered sent by mail, or sent out to be packed.

153-157 Fifth Avenue, Between 21st and 22d Streets.

NEW YORK, —— —, 190–.

M—— ——

Folio ——

Bought of Charles Scribner's Sons, Publishers, Importers and Booksellers.

Terms:—Net Cash. Payable with Exchange on New York.
Sent per ——.

Copyrighted Net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on con-

dition that prices must be maintained as provided by the regulations of the American Publishers' Association.

In complainants' evidence we find this in this subject: Q. "Is any other method taken to bring the rules of the association to the notice of purchasers in the wholesale department?" A. "Not by Charles Scribner's Sons." As to new customers the witness says: Q. "When a new firm comes to deal with Charles Scribner's Sons that is unknown to you, what do you do?" A. "We get what information we can as to their standing and whether or not they
109 will be willing to maintain the rules of the association by referring the matter to the association for investigation, or sometimes by sending them this blank which has been presented. Q. "Can you say whether or not these rules are, in one way or another, brought to the attention of every purchaser from the wholesale department?" A. "No, sir." Q. "They are not brought to their notice?" A. "Except in the way I have described, by the billheads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases." Q. "Have any sales been made by Charles Scribner's Sons since the adoption of those rules in their wholesale department except subject to those rules?" A. "No, sir." Q. "They are not brought to their notice?" A. "Except in the way I have described, by the billheads and the catalogues and in case of a new purchaser, by correspondence and sending that notice in some cases."

It is conceded that defendants knew of the rules and of the custom of the complainants. Defendants did not purchase any books of complainants. They had a purchasing agent who purchased them where they could get them, paying therefor in cash.

In the Bobbs-Merrill case, just decided and above referred to, this Court has held, following the Circuit Court of Appeals in the Second Circuit, in Harrison *v.* Maynard, Merrill & Co., 26 U. S. App. 99; 61 Fed. Rep., 689, that so long as the publisher of a copyrighted book (such publisher owning the copyright) retains the title to the copies which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and the person to whom the copies can be sold. If agents or licensees, intrusted with the possession of such books, not having
110 title, violate their instructions and sell to a person who has knowledge of the restricted power, such sale of such copyrighted book is an infringement and may be restrained. This right results from the fact that the owner of the copyright and copyrighted book has not parted with the title to the book or to the copyright. The right to restrain the sale is gone, however, when the owner of the copyright and of the copy or copies in question parts with his title to such copy or copies and confers an absolute title on the purchaser, even if such sale be accompanied with an agreement for a restricted use, or for a sale at a fixed price.

We come then, in these cases, to the question whether the complainants in either case retained title to the books, or any of them, that passed to the possession of the defendants and which they have

been and are engaged in selling. It seems clear that they did not. They conferred no conditional or defeasible title, but an absolute title. Some books the defendants purchased direct of the complainants at retail and paid the full retail price. They sold the same at retail at a loss. This they had the right to do. They were the absolute owners. The others were purchased of dealers who had purchased of the complainants and paid the full price demanded. There was no notice on each book and it does not appear that these dealers had seen the catalogues, or that they had a bill of sale containing the notice. But, however, this may be, the notice does not retain the title, or restrict or limit the title conveyed. If so, the complainants could have replevined the books when they found they were being sold in violation of instructions given their licensees intrusted with the books. It may be, and it may not be, that the dealers from whom the defendants took title knew of the con-

111 ditions of the notice when they purchased of the complainants. If they did they impliedly agreed that in selling the books which they then purchased of complainants they would maintain prices. If so the relation was contractual and the remedy of complainants is for a breach of that contract if they can find the person or firm who violated it. The notice is not a license agreement, as in the Neostyle case, recently decided by this Court, and others there cited. (Cortelyou *et al. v.* Charles E. Johnson Co.) Reference is made to the opinion of this Court in the Bobbs-Merrill case for a full statement of the law. In this case the notice does not purport to restrict title, or create an agency, or establish a license agreement.

There is no evidence that will justify a finding that defendants have unlawfully or improperly induced any person to violate their contract, if any, with complainants.

In each suit the defendants are entitled to a decree dismissing the complaint, with costs.

(Endorsed:) United States Circuit Court, Southern District of New York.—Charles Scribner *et al. v.* Isidor Straus *et al.*—No. 8,583.—Charles Scribner's Sons, Incorporated, *v.* Isidor Straus, *et al.*—No. 8,936.—Opinion, Geo. W. Ray, U. S. Judge.—U. S. Circuit Court, Southern District New York.—Filed July 11, 1905.—John A. Shields, Clerk.

112 United States Circuit Court, Southern District of New York.

In Equity. No. 8936.

CHARLES SCRIBNER'S SONS, Incorporated, Complainant,
against
ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy and Company, Defendants.

This cause having come on to be heard on the 17th day of January, 1905, upon the pleadings and proof and Stephen H. Olin, Esq.,

having been heard on the part of the complainant and Hon. John G. Carlisle and Edmond E. Wise, Esq., having been heard on the part of the defendants and due deliberation having been had, it is

Ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed with costs to defendants to be [illegible]

GEO. W. RAY, *U. S. Judge.*

Aug. 11, 1905.

(Endorsed:) U. S. Circuit Court, Southern District of New York.—Charles Scribner's Sons, Incorporated *vs.* Isidor Straus & ano.—Decree.—Spiegelberg & Wise, Solicitors for Defendants, 19 William Street, New York.—U. S. Circuit Court, Southern District, New York.—Filed Aug. 12, 1905.—John A. Shields, Clerk.

113 United States Circuit Court, Southern District of New York.

In Equity. 8396.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation Duly Incorporated under the Laws of the State of New Jersey, and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainants and Appellants,

against

ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City and State Aforesaid, Having a Regular and Established Place of Business in the Said Borough of Manhattan, Individually and as Co-partners, Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

To the Honorable the United States Circuit Court of Appeals for the Second Circuit:

The appeal of the above named Charles Scribner's Sons, Incorporated, complainant and appellant, respectfully showeth:

114 That on the 23rd day of December, 1904, your petitioner filed its bill in the Circuit Court of the United States for the Southern District of New York, against the above named defendants and respondents, praying that the said defendants be enjoined and restrained from certain unlawful acts and practices set forth in the said bill of complaint and that they might be decreed to account for and pay over the income and profits by their aforesaid unlawful acts derived in violation of the complainants' rights, and might be perpetually enjoined and restrained from any further publication, sale, circulation or distribution in any manner of certain books known and described as

"Bred in the Bone."
"Christmas Eve on Lonesome and other Stories."
"A Parody Anthology;"

that the said defendants and each of them might be enjoined and restrained from obtaining the said books or either of them from

jobbers and booksellers to whom they have been or might have been or may be transferred from the complainant- by conditional sale in violation of such condition, and for an accounting and injunction pending the final determination of the suit; and for such other relief as might be just and proper.

That on or about the 23d day of December, 1904, the said defendants and respondents filed their joint answer denying certain averments in said bill contained and interposing two further answers and defenses, the first, numbered 1, that the cause of action set forth in the complaint is not a proper cause for the intervention of a Court of Equity, and that a Court of Equity is without jurisdiction thereof, and the second, numbered 2 to 17, both inclusive,
115 setting up that the complainant and others are parties to an unlawful agreement and combination to control the sale of books, etc., etc., and praying that it be dismissed with costs.

That on the 23rd day of December, 1904, the complainant filed exceptions to that part of the said answer which constituted such second further answer and defense; numbered 2 to 17, both inclusive; and that by an order made at a stated term of the Supreme Court of the United States for the Southern District of New York, Hon. E. Henry Lacombe, Circuit Judge, presiding, which order was filed upon the 23rd day of December, 1904, the said exceptions of the complainant were sustained and the said second further answer and defense of the defendants was stricken out as impertinent.

That on the 23rd day of December, 1904, the complainant filed its replication denying the averments of said answer of the defendants; that thereafter the complainant and the defendants took their respective proofs to final hearing under the 67th Rule of the Supreme Court as amended, and that thereafter and on or about the 17th day of January, 1905, a final hearing was had in open court before the Hon. George W. Ray, Judge; that on or about the 12th day of August, 1905, a final decree was made and pronounced in the cause wherein it was in substance adjudged and decreed that the bill of complaint be dismissed with costs.

Wherefore, this appellant appeals from the whole of said decree of the said Circuit Court of the United States and respectfully prays that the said decree of said Circuit Court, and the bill of complaint, answer, replication and transcripts, and all the pleadings, depositions, evidence, exhibits, proofs and proceedings in the said cause may be sent to the United States Circuit Court of Appeals for the Second Circuit without delay, and that the said United States Circuit Court of Appeals for the Second Circuit will
116 proceed to hear the said cause anew, and that the said decree dismissing the said bill of complaint and every part thereof may be reversed, and a decree made by the United States Circuit Court of Apeals for the Second Circuit that this complainant and appellant is entitled to the relief prayed for in the said bill of complaint, and that the cause may be remanded to said Circuit Court for final trial and hearing, and for costs against said defendants and appellees in favor of this complainant and appellant, in this Court and in the said Circuit Court, and for such other decree as to the

United States Circuit Court of Appeals for the Second Circuit may seem just.

OLIN, CLARK & PHELPS,
Solicitors for Appellants.

STEPHEN H. OLIN,
Of Counsel.

The foregoing appeal is hereby allowed.
New York, Sept. 5th, 1905.
(Signed) E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York.—Charles Scribner's Sons, Incorporated, etc., Complts., etc., Appellants, against Isidor Straus and Nathan Straus, Def'ts, etc., Respts.—Appeal.—Olin, Clark & Phelps, Solicitors for Complts., etc., Appelts., 32 Nassau Street, New York City.—Service of a copy of the within Appeal and notice is hereby admitted.—Dated Sept. 5th, 1905.—Spiegelberg & Wise, Solicitors for Def'ts, etc., Respdts.—U. S. Circuit Court, Southern District of New York.—Filed Sept. 6, 1905.—John A. Shields, Clerk.

117 United States Circuit Court of Appeals for the Second Circuit.

In Equity. 8936.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation Duly Incorporated under the Laws of the State of New Jersey, and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainant and Appellant,

against

ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

The complainant above named by Olin, Clark & Phelps, its solicitors, and in connection with its appeal from the decree herein of the Circuit Court of the United States for the Southern District of New York, dismissing the complainant's bill of complaint, makes and files the following assignment of errors:

I. That Hon. George W. Ray, the judge presiding at the trial of said case, dismissed the complainant's bill of complaint,
118 and did not sustain said bill and grant an injunction as prayed so far as concerns "Christmas on Lonesome and other Stories" and "A Parody Anthology."

II. That said judge dismissed the complainant's bill of complaint and did not sustain said bill and decree the accounting as therein praved for.

III. That the said judge did not find and decide that the complainant is the legal owner of the copyrights of the books described

in the complaint, and is entitled to the full benefit of the copyright laws thereunder.

IV. That the said judge did not find and decide that all sales by the complainant of copyright books published by it as in said bill set forth (except only such sales as were made at retail for the full "net price") were conditional or restricted sales, upon the lawful condition that the purchaser should take and hold the same subject to the rules of the American Publishers' Association, as in said bill set forth, and that prices thereof be maintained as provided in said rules.

V. That said judge did not find and decide that all purchasers of said copyright books (except purchasers at retail at net prices) had at the time of their respective purchases full and complete notice of the said conditions and restrictions, and that thereby the complainant became and is entitled to the full performance of said conditions by all such purchasers under the protection of the copyrights mentioned in said bill, and that the complainant is vested, by the said copyrights and by virtue of the said conditional sales, with the right to the fulfilment and performance of
119 said conditions and restrictions and of the said agreement, on the part of the jobbers and dealers, including the defendants, to whom said books have been transferred by said conditional sales, and also with immunity against interference from any one, including the defendants, with respect to the said conditions, and that none of the said purchasers can lawfully sell the said books so conditionally transferred to them except by complying with the conditions of such transfer.

VI. That the said judge did not find that the sales by defendants of copies of the said books were without the complainants' consent or permission, and that all such sales were in violation of the complainant's rights secured under the copyright acts of the United States.

VII. That said Judge did not find and decide that the defendants induced and persuaded sundry jobbers and dealers who were possessed of copies of the said books to deliver the same to the defendants for sale at retail at less than the net retail price fixed by the complainant for such books, respectively, and that said acts of the defendants were in violation of the agreement, condition and restrictions aforesaid, as set forth in the said bill.

VIII. That the said judge did not find and decide that the defendants induced certain jobbers and dealers to break their contracts with complainant and thereby induce other persons to suppose that said contracts are invalid.

IX. That the said judge did not find and decide that the defendants acted as set forth in the said bill and that such acts
120 were injurious to the complainant and constituted an infringement of its rights under such copyrights and were manifestly wrong and improper.

And by reason of the aforesaid errors, the said complainant prays that the decree and judgment aforesaid may be reversed, annulled and altogether held for naught, and that the case may be remanded

to the Circuit Court with direction that a decree be entered in favor of the complainant in accordance with the prayer of the bill of complaint; and that they may have such other relief as to the court may seem just.

OLIN, CLARK & PHELPS,
Solicitors for Appellants.

STEPHEN H. OLIN,
Of Counsel.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Charles Scribner's Sons, Incorporated, etc., Complts., etc., Appelts., against Isidor Straus and Nathan Straus, Defts., etc., Respts.—Assignment of Errors.—Olin, Clark & Phelps, Solicitors for Complts. & Appelts., 32 Nassau St., New York City.—U. S. Circuit Court, Southern District of New York.—Filed Sept. 2, 1905.—John A. Shields, Clerk.

121 United States Circuit Court of Appeals for the Second Circuit.
In Equity. 8936.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation duly Incorporated under the Laws of the State of New Jersey, and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainants and Appellants,

against

ISIDOR STRAUS and NATHAN STRAUS, Residents of the Borough, City and State Aforesaid, Having a Regular and Established Place of Business in the said Borough of Manhattan, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

Know all men by these presents, That we, Charles Scribner's Son's, Incorporated, a corporation duly incorporated under
122 the laws of the State of New Jersey and having its principal place of business at No. 153 Fifth Avenue, in the city, County and State of New York, and National Surety Company, having an office and place of business at No. 35 Nassau Street, in the City, County and State of New York, are held and firmly bound unto the above named Isidor Straus and Nathan Straus in the sum of ($300) Three hundred dollars, to be paid to the said Isidor Straus and Nathan Straus, their executors, administrators or assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally firmly by these presents. Sealed with our seals and dated the 1st day of September, in the year of our Lord, One thousand nine hundred and five.

Whereas, the above-named Charles Scribner's Sons, Incorporated, has appealed to the Circuit Court of Appeals of the United States for the Second Circuit, from a decree of the Circuit Court of the

United States for the Southern District of New York, bearing date and entered the 12th day of August, 1905, in a suit in which said Charles Scribner's Sons, Incorporated, was complainant against Isador Straus and Nathan Straus, defendants,

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against it as such appellants therein, if it shall fail to make said appeal
123 good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

CHARLES SCRIBNER'S SONS, INC., [SEAL.]
By CHARLES SCRIBNER, *President.*
[SEAL.] NATIONAL SURETY COMPANY,
By ARTHUR P. WEST, *Res. Vice-President.*

Attest:
E. CASHION,
[SEAL.] *Res. Asst. Secretary.*

STATE OF NEW YORK, *County of New York, ss:*

On the first day of September, in the year one thousand nine hundred and five, before me personally came Charles Scribner, to me known, who, being by me duly sworn, did depose and say: That he resided in Borough Manhattan, New York City; that he is the President of Charles Scribner's Sons, Incorporated, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] JONATHAN H. HOLMES,
Notary Public, New York County.

STATE OF NEW YORK, *County of New York, ss:*

On this 2d day of September, 1905, before me personally appeared Arthur P. West, Resident Vice-President of the National
124 Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of the New York Session Laws of 1893. And the said Arthur P. West further said that he is acquainted with E. Cashion, and knows him to be the Resident Assistant Secretary of said Company; that

the signature of the said E. Cashion subscribed to the said instrument is the genuine handwriting of the said E. Cashion and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Arthur P. West, Resident Vice-President.

BELLE F. JAIS,
Notary Public for the County of N. Y.

Certificate filed in Kings, Westchester, Richmond and Queens Counties.

Copy of By-Law.

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required*—All
125 "bonds, recognizances, contracts of indemnity and other "writings obligatory in the nature thereof, shall be signed "by the President, the Vice-President, the Second Vice-President, "a Resident Vice-President, or an attorney in fact, and, except "when signed by an attorney in fact, shall have the seal of the "Company affixed thereto, duly attested by the Secretary, an As- "sistant Secretary or a Resident Assistant Secretary. The Vice- "President, Second Vice-President and Resident Vice-Presidents "shall each have authority to sign such instruments whether the "President be absent or incapacitated or not; and the Assistant "Secretaries and Resident Assistant Secretaries shall each have "authority to seal and attest such instruments, whether the Secre- "tary be absent or incapacitated or not. All such instruments "executed as herein provided shall be as *as* binding upon the Com- "pany as if the same were signed by the President, duly sealed and "attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, E. Cashion, Resident Assistant Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and seal of the Company this 2d day of September, 1905.

E. CASHION.
Res. Assistant Secretary.

(Endorsed:) United States Circuit Court of Appeals for the
126 Second Circuit.—Charles Scribner's Sons, incorporated, etc., Compl'ts & Appel'ts, *vs.* Isidor Straus and Nathan Straus, Def'ts & Resp'ts.—Supersedeas Bond.—Olin, Clark & Phelps, Solicitors for Compl'ts & Appel'ts, 32 Nassau Street, New York City.—

Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Def'ts of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York.—Filed Sep. 6, 1905.—John A. Clark, Clerk.

By the Honorable —— ——, one of the Justices of the United States Circuit Court of Appeals for the Second Circuit, to Isidor Straus and Nathan Straus:

Whereas, Charles Scribner's Sons, Incorporated, a corporation duly incorporated under the Laws of the State of New Jersey, and having a regular and established place of business in the City of New York, Borough of Manhattan and State of New York, has lately appealed to the United States Circuit Court of Appeals for the Second Circuit from a decree lately rendered in the Circuit Court of the United States for the Southern District of New York, made in favor of you, the said Charles Scribner's Sons, Incorporated, and have filed the security required by law; you are therefore to appear
127 before the said United States Circuit Court of Appeals for the Southern District of New York, at the City of New York, on the 2d day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the Borough of Manhattan in the City of New York, in the Southern District of New York in the Second Circuit, the 5th day of September, in the year of our Lord one thousand nine hundred and five.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Charles Scribner's Sons, Incorporated, etc., Compl'ts & Appel'ts, against Isidor Straus and Nathan Straus, Def'ts & Resp'ts.—Citation.—Olin, Clark & Phelps, Solicitors for Compl'ts & Appel'ts, 32 Nassau Street, New York City.—Service of a copy of the within Citation and notice is hereby admitted. Dated Sept. 6th, 1905.—Spiegelberg & Wise, Solicitors for Def'ts & Resp'ts.—U. S. Circuit Court, Southern District of New York.—Filed Sep. 6, 1905.—John A. Shields, Clerk.

128 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 122, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Charles Scribner's Sons, Incorporated, Complainant-Appellant, against Isidor Straus and Nathan Straus, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of September, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and thirtieth.

[L. S.] JOHN A. SHIELDS, *Clerk.*

129 United States Circuit Court of Appeals for the Second Circuit.

Nos. 185 and 186, October Term, 1905.

Argued April 3, 1906, Decided June 16, 1906.

CHARLES SCRIBNER and ARTHUR SCRIBNER, Trading as Charles Scribner's Sons, Complainants-Appellants,

vs.

ISIDOR STRAUS and NATHAN STRAUS, Trading as R. H. Macy & Company, Defendants-Appellees.

CHARLES SCRIBNER'S SONS, Incorporated, Complainants-Appellants,

vs.

THE SAME, Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend, and Coxe.

These causes come here upon appeals from decrees of the United States Circuit Court for the Southern District of New York, dismissing bills alleging infringement of copyright.

TOWNSEND, *Circuit Judge:*

The facts herein are as follows:

The complainants, under the firm name of Charles Scribner's Sons, are publishers and sellers of books. The defendants are partners under the firm name of R. H. Macy & Company,
130 and are carrying on the business of a department store, wherein they sell at retail only, books, copyrighted and uncopyrighted.

About the year 1901, certain publishers of copyrighted books formed an association, known as The American Publishers' Association, and, in pursuance of a "plan to correct some of the evils connected with the cutting of prices on copyrighted books," its members agreed, *inter alia*, as follows:

"III. That the members of the Association agree that such net copyrighted books and all others of their books, shall be sold by them to those booksellers only, who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and job-

bers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the Association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations, as may be established by local associations as hereinafter provided."

Defendants refused to enter said Association or to abide by any of its rules, and sold books at prices less than those fixed by the Association; thereupon it issued a circular, requesting all publishers and booksellers to refuse any dealing of any kind with defendants, and complainants, who were members of said Association, refused to sell any books to defendants. Thereafter, defendants bought books from other dealers, including those published by complainants, and sold them at such prices as they saw fit. Their purchases were made from people who knew that they intended to sell them at less than the prices fixed by the Association. Complainants, thereupon, brought this suit against defendants to restrain them from selling complainants' copyrighted books at prices less than those fixed by complainants, and from buying any of such books except under the rules and regulations of said Association.

131 Complainants caused to be printed at the head of their catalogues and on their invoices and bills for goods, the following notice:

"Copyrighted net books, published after May 1st, 1901, and copyrighted books published after February 1st, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association."

Complainants admitted that no other method was taken to bring the rules of the association to the notice of purchasers in the wholesale department, and that they could not say whether or not these rules were, in one way or another, brought to the attention of every purchaser from the wholesale department; but that notice was given, in case of a new purchaser, by correspondence and by sending the following blank:

"American Publishers' Association.

"—— —, 190–.

"In consideration of discount allowed on books bought from —— —— we hereby agree that for one year from date of publication we will not sell net books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1st, 1902, at a greater discount than 28 per cent. at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers' Association to any dealer known to us to cut prices of net books or of new fiction except as above provided."

Complainants admitted that if dealers were asked to sign this notice and refused to sign it, the trade was still allowed to sell to them, and would sell to them.

On the other hand, if a new member of the trade, or one about

whom the trade was in doubt, made application for books,
132 the matter was referred to the Association, before sales were made, and the pledge to the Association was executed before deliveries were made.

Complainants say that the question presented is the following:

"Where the proprietor of a copyright sells copies of his copyrighted book by a conditional sale, subject to a restriction upon further sale, and to a purchaser who agrees to comply therewith, are these copies of the book released from the monopoly as against persons having notice of the restrictions?"

Upon this assumption of fact complainants argue that the same rule should be applied as in restricted sales in patent cases, namely:

" 'to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly.' National Phonograph Co. *v.* Schlegel (128 Fed., 733, 735);"

and that defendants, by inducing booksellers to break their contracts, are guilty of contributory infringement of copyright. Complainants further seek to take advantage of the rules established in cases of restricted sales of proprietary articles manufactured under secret processes.

The questions raised herein are discussed in the opinion of this court in the case of The Bobbs-Merrill Company against these defendants, decided at this term of court, — Fed., —. For the reasons therein stated, we are of the opinion that the claims arising out of the peculiar rights attached to articles made by secret processes, or the statutory rights in articles protected by patents or copyright, do not directly bear upon the questions raised herein, although the discussions in some of said cases cover the principles applicable to this case.

133 There is no statement in the printed notice or blanks of any claim of right under the copyright law. The question of liability by reason of such notice is not one of infringement of copyright. The question is one as to the right of these complainants to relief in a court of equity, by virtue of their common law rights, independent of statutory copyright, in view of the fact that they have issued, as above, printed notices that

"Copyrighted books * * * are sold on condition that prices be maintained as provided by the regulations of The American Publishers' Association," &c.

But this question is not open to discussion in these cases as there is neither the diversity of citizenship, in the first case, nor the claim of damages in the sum of $2,000, in either case, requisite to confer jurisdiction of questions not arising out of the copyright law.

The complainants further contend that defendants have been guilty of contributory infringement of copyright because they, knowing of complainants' refusal to sell, except upon condition that

the rules of the Publishers' Association should be obeyed as to resale and maintenance of prices,

"designing and contriving to benefit themselves at the expense of and to the injury of your orators, have, as your orators are informed and believe, in the Borough of Manhattan and elsewhere in the United States, induced and persuaded sundry of the jobbers and dealers who have obtained from your orators as aforesaid, books published under the above enumerated copyrights, to deliver the same books to the defendants for sale at retail at less than the net retail prices fixed by your orators for such books respectively, in violation of the agreement, conditions and restrictions upon which as aforesaid the said jobbers and dealers have obtained such books and hold the same as aforesaid; and the defendants have thus
134 induced such jobbers, booksellers and dealers to break and violate the agreement and condition as to maintaining prices and selling to no one known to cut net prices, so as aforesaid made and assumed by them."

The answer "admits, on information and belief, that the complainants have made all sales of books subject to the rules of the American Publishers' Association as set forth," but denies all the allegations as to attempts on defendants' part to induce dealers to violate the agreements, conditions and instructions on which they obtained said books.

The evidence fails to show that defendants have wrongfully induced any person to break his agreement with complainants.

The facts bearing on this contention are substantially as follows:

The defendants "have been compelled to purchase books through secret ways," and the books which they have "succeeded in buying were bought from people who knew the price for which deponent (defendants' agent) bought them, * * * and who were willing to take the risk of incurring the displeasure of the combined publishers and combined booksellers for the profits that she offered them."

In some instances members of the Association were required to sign papers or agreements with The American Publishers' Association, but in a great many cases they were not required to sign unless they were new comers in the business, and, "generally speaking, such signature was only exacted from those traders who were new in the business;" and if purchasers were asked to sign and refused, the trade was still allowed to sell to them, and would sell to them; and apparently this pledge was to a considerable extent a mere matter of form.

It nowhere satisfactorily appears that defendants purchased
135 from complainants' vendees or from anyone who made any contract to obey said rules. It does not appear that defendants may not have bought from sub-vendees or from those dealers who refused to sign the pledge as to resale, and to whom the trade was allowed to sell and did sell books.

The evidence fails to show which dealers, if any, from whom defendants purchased books, ever assented to said attempted con-

ditions, or accepted them or agreed to abide by the terms as to retail prices. Such assent or agreement cannot be implied from mere purchases, for such books may have been lawfully sold and bought upon an express refusal to sign said pledge.

In the absence of proof of any reservation of right in the copyright by its owner, or of an agreement by the dealers from whom defendant purchased to abide by said rules, or of a wrongful attempt on the part of defendants to induce its vendors to break any contract, there can be no foundation for a claim of contributory infringement of copyright.

In these circumstances, it is unnecessary to apply to the facts proven herein the principles stated in the Bobbs-Merrill Company against these defendants, *supra*, that a violation of the restrictions attempted to be imposed upon sales of copyrighted books is not an infringement of copyright.

The decree is affirmed.

Stephen H. Olin, for the Appellants.
Edmond E. Wise and *John C. Carlisle*, for the Appellees.

136 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 26th day of June one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

CHARLES SCRIBNER'S SONS, Incorporated, Complainants-Appellants,
vs.
ISIDOR STRAUSS and NATHAN STRAUSS, Trading as R. H. Macy & Company, Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.

137 Endorsed: United States Circuit Court of Appeals, Second Circuit. Scribner *vs.* Strauss. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jun- 29, 1906. William Parkin, Clerk.

138 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation Duly Incorporated under the Laws of the State of New Jersey and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainant and Appellant,

against

ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

The above-named complainant and appellant, Charles Scribner's Sons, Incorporated, a corporation duly incorporated under the laws of the State of New Jersey, and having a regular and established place of business in the Borough of Manhattan, City of New York, State of New York, feeling itself aggrieved by the final order or decree of the United States Circuit Court of Appeals for the Second Circuit made in the above entitled cause in equity and filed in the office of the Clerk of said Court on the 29th day of June, 1906, affirming the decree of the United States Circuit Court in and for the Southern District of New York herein filed in the office of the Clerk of said Court on the 12th day of August, 1905, dismissing the bill of complaint herein with costs, now comes, by Olin, Clark & Phelps, its solicitors, and petitions this Court for an order
139 allowing said complainant-appellant to prosecute an appeal from said order or decree of this Court to the Supreme Court of the United States under and according to the laws of the United States in this behalf made and prays that this appeal may be allowed, and that a transcript of the record and proceedings upon which said order or decree was made, duly authenticated may be transmitted by the Clerk of his Court to the Supreme Court of the United States.

Dated, 10th January, 1907.

OLIN, CLARK & PHELPS,
Solicitors for Appellant, 32 Nassau Street, Manhattan, New York City.

The foregoing appeal is hereby allowed this 11th day of January, 1907.

WM. K. TOWNSEND,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

140 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner's Sons, Incorporated, etc., Compl'ts & Appel'ts, *vs.* Isidor Straus and Nathan Straus, Def'ts & Resp'ts. Copy. Petition of Appeal. Olin, Clark & Phelps, Solicitors for Compl'ts-Appel'ts, 34 Nassau Street, Borough of Man-

hattan, New York City. (Mutual Life Building.) Received Jan. 11, 1907. Edmond E. Wise. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 11, 1907. William Parkin, Clerk.

141 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation Duly Incorporated under the Laws of the State of New Jersey and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainant and Appellant,

against

ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

The complainant-appellant above named, by Olin, Clark & Phelps, its solicitors in connection with its petition of appeal to the Supreme Court of the United States filed the 11th day of January, 1907, from the final order or decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, in equity, filed on the 29th day of June 1906, affirming the decree of the United States Circuit Court for the Southern District of New York herein makes the following assignment of errors:

First. The Court erred in finding that the complainant admitted that no other method was taken to bring the rules of the Association to the notice of purchasers in the wholesale department, and that they could not say whether or not these rules were in one way or
142 another brought to the attention of every purchaser by the wholesale department.

Second. The Court erred in finding that complainants admitted that if dealers were asked to sign a notice and refused to sign it the trade was still allowed to sell to them, and would sell to them.

Third. The Court erred in deciding that the claims arising out of the peculiar rights attached to articles made by secret processes or statutory rights of articles protected by patents or copyright do not directly bear upon the questions raised herein.

Fourth. The Court erred in holding that the question of liability of the defendants is not one of infringement of copyright.

Fifth. The Court erred in deciding that the evidence fails to show that defendants have wrongfully induced any person to break his agreement with complainant.

Sixth. The Court erred in deciding that it nowhere satisfactorily appears that defendants purchased from the complainant's vendees or from any one who made any contract to obey said rules.

Seventh. The Court erred in deciding that books may have been lawfully sold and bought upon an express refusal to sign said pledge.

Eighth. The Court erred in holding that there was no foundation for claim of contributory infringement of copyright.

143 Ninth. The Court erred in deciding that the principles stated in Bobbs-Merrill Co. against these defendants, 147 Fed. Rep., 15, namely,—"that a violation of the restrictions attempted to be imposed upon sales of copyright books is not an infringement of copyright," are applicable to the facts proven herein.

Tenth. The Court erred in affirming the decree of the Court below dismissing the appeal of complainant.

Wherefore appellant prays that the said final order or decree herein be reversed, and for such other and further relief as may be equitable.

Dated, 11 January, 1907.

OLIN, CLARK & PHELPS,
Solicitors for Complainant-Appellant, 32 Nassau Street, Manhattan, New York City.

W. K. T.

144 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner's Sons, Incorporated, etc., Compl'ts & Appel'ts, *vs.* Isidor Straus and Nathan Straus, Def'ts & Resp'ts. Copy. Assignment of Errors. Olin, Clark & Phelps, Solicitors for Compl'ts-Appel'ts, 34 Nassau Street, Borough of Manhattan, (Mutual Life Building.) New York City. Received Jan. 11, 1907. Edmond E. Wise. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 11, 1907. William Parkin, Clerk.

145 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation Duly Incorporated under the Laws of the State of New Jersey and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainant and Appellant,

against

ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

Know all men by these presents, That the National Surety Company, a corporation organized under the laws of the State of New York, having an office and place of business at No. 62 Liberty Street, in the City, County and State of New York, is held and firmly bound unto the above named Isidor Straus and Nathan Straus in the sum of Five hundred ($500.) dollars to be paid to the said Isidor Straus and Nathan Straus, their executors, administrators or assigns, for the payment of which well and truly to be made it binds itself, its successors and assigns, jointly and severally firmly by these presents.

Sealed with its seal and dated the 10th day of January, in the year of our Lord one thousand nine hundred and seven.

Whereas the above named Charles Scribner's Sons, Incorporated, a corporation duly incorporated under the laws of the State of New Jersey, and having a regular and established place of business in the City of New York, Borough of Manhattan, State of New
146 York, has appealed to the Supreme Court of the United States from a final order or decree of the United States Circuit Court of Appeals for the Second Circuit filed in the office of the Clerk of said United States Circuit Court of Appeals on the 29th day of June, 1906, affirming with costs the decree of the United States Circuit Court for the Southern District of New York filed in the office of the Clerk of said Court on the 12th day of August, 1905, dismissing the bill of complaint in the above entitled action.

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against them as such appellants therein if they shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

NATIONAL SURETY COMPANY,
[SEAL.] By JOEL RATHBONE, *Res. Vice President.*

Attest:
JOHN HOLMES,
Res. Ass't Secretary.

The foregoing bond approved as to form amount and sufficiency of surety.

WM. K. TOWNSEND,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

147 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK, *County of New York, ss:*

On this 10th day of January one thousand nine hundred and Seven before me personally came Joel Rathbone, known to me to be the Resident Vice President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Charles Scribner's Sons, Inc. *vs.* Isidor Straus and ano. as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York: that he is the Resident Vice President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Charles Scribner's Sons, Inc. *vs.*

Isidor Straus and ano. is the corporate seal of said Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice President of said Company and that he is acquainted with John Holmes and knows him to be the Res. Ass't Secretary of said Company; and that the signature of said John Holmes subscribed to said Bond is in the genuine handwriting of said John Holmes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million ($1,000,000.) dollars.

That —— —— is our agent to acknowledge service in the Judicial District wherein this Bond is given.

JOEL RATHBONE.

(Deponent's signatures.)

Sworn to, acknowledged before me, and subscribed in my presence this 10th day of January, 1907.

PHILIP B. INGRAHAM,

Notary Public for the County of N. Y., No. 13.

(Officer's signature, description and seal.)

Certificate filed in Kings, Westchester, Richmond & Queens Counties.

148 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner's Sons, Incorporated, etc., Compl'ts & Appel'ts, *vs.* Isidor Straus and Nathan Straus, Def'ts & Resp'ts. Copy. Bond on Appeal. Olin, Clark & Phelps, Solicitors for Compl'ts-App'l'ts, 34 Nassau Street, Borough of Manhattan, (Mutual Life Building,) New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 11, 1907. William Parkin, Clerk.

149 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation Duly Incorporated under the Laws of the State of New Jersey and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainant and Appellant,

against

ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

STATE OF NEW YORK, *County of New York, ss:*

Charles Scribner, being duly sworn, says:

I reside in Morristown, in the State of New Jersey, and am President of Charles Scribner's Sons, Incorporated, the complainant and appellant above named.

I have been actively engaged for many years in the business of printing, manufacturing, publication and sale of books and have from time to time printed, published and sold great numbers of books under the protection of the copyright law of the United States.

That the right of the complainants to maintain the retail price of the copyright books as set forth in the bill of complaint was at the time of commencing this action and now is worth over the sum of one thousand dollars.

150 That the damages sustained by the complainant as set forth in the bill of complaint exceed the sum of one thousand dollars.

CHARLES SCRIBNER.

Sworn to before me, this 10th day of January, 1907.

ROBERT F. BARRETT,

[SEAL.] *Notary Public, New York County.*

151 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Charles Scribner's Sons, Incorporated, Compl't-App'l't, *vs.* Isidor Straus and Nathan Straus, Def'ts & Resp'ts. Order and Affidavit. Olin, Clark & Phelps, Solicitors for Compl't-App'l't, 34 Nassau Street, Borough of Manhattan, (Mutual Life Building,) New York City. Service of a copy of the within affidavit and order is hereby admitted. Dated January, —, 1907. Edmond E. Wise. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1907. William Parkin, Clerk. Ordered filed. Wm. K. Townsend, U. S. C. J.

152 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 151 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Charles Scribner's Sons, Inc., etc., against Isidor Straus and Nathan Straus as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of January, in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

153 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

CHARLES SCRIBNER'S SONS, Incorporated, a Corporation Duly Incorporated under the Laws of the State of New Jersey and Having a Regular and Established Place of Business in the City of New York, Borough of Manhattan, State of New York, Complainant and Appellant,

against

ISIDOR STRAUS and NATHAN STRAUS, Individually and as Co-partners Trading under the Firm Name and Style of R. H. Macy & Co., Defendants and Respondents.

By the Honorable William K. Townsend, one of the Justices of the United States Circuit Court of Appeals for the Second Circuit.

To Isidor Straus and Nathan Straus:

Whereas Charles Scribner's Sons, Incorporated, a corporation duly incorporated under the laws of the State of New Jersey, and having a regular and established place of business in the City of New York, Borough of Manhattan and State of New York, has lately appealed to the Supreme Court of the United States from a final order or decree of the United States Circuit Court of Appeals from the Second Circuit, made in favor of you, the said Isidor Straus and Nathan Straus, which final order or decree affirmed with costs the decree of the United States Circuit Court for the Southern District of New York, filed in the office of the Clerk of said
154 Court on the 12th day of August, 1905, and have filed the security required by law.

Therefore you are hereby cited to appear before the said Supreme Court of the United States at a term thereof to be holden at Wash-

ington on the 10th day of February, 1907, to do and to receive what may appertain to justice to be done in the premises.

Given under my hand at the Borough of Manhattan, City of New York, in the Second Circuit, the 11th day of January, in the year of our Lord, One thousand nine hundred and seven.

WM. K. TOWNSEND.

155 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Charles Scribner's Sons, Incorporated, etc., Compl'ts & Appel'ts, *vs.* Isidor Straus and Nathan Straus, Def'ts & Resp'ts. Original. Citation. Olin, Clark & Phelps, Solicitors for Compl'ts-Appel'ts, 32 Nassau Street, Borough of Manhattan, (Mutual Life Building,) New York City. Service of a copy of the within citation is hereby admitted. Dated 11 January, 1907. Edmond E. Wise, Solicitor for Def'ts & Resp'd'ts. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1907. William Parkin, Clerk.

Endorsed on cover: File No. 20,537. U. S. circuit court of appeals, 2d circuit. Term No. 205. Charles Scribner's Sons, Incorporated, appellant, *vs.* Isidor Straus and Nathan Straus, individually and as copartners trading under the name of R. H. Macy & Company. Filed January 18th, 1907. File No. 20,537.

IN THE

Supreme Court of the United States

No. [illegible]

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, trading as CHARLES SCRIBNER'S SONS,

Appellants,

against

ISIDOR STRAUS and NATHAN STRAUS, individually and as co-partners trading under the firm of R. H. MACY & COMPANY,

Appellees.

No. [illegible]

CHARLES SCRIBNER'S SONS, Incorporated,

Appellant,

against

ISIDOR STRAUS and NATHAN STRAUS, individually and as co-partners trading under the name of R. H. MACY & COMPANY,

Appellees.

Brief and Argument for Appellants.

STEPHEN H. OLIN,

Solicitor and of Counsel for Appellants.

OLIN, CLARK & PHELPS,

Solicitors.

Brooklyn Daily Eagle Printing Office, 361 Fulton St., New York.

IN THE

United States Supreme Court.

CHARLES SCRIBNER and another, trading as Charles Scribner's Sons,
Complainants-Appellants,

AGAINST

ISIDOR STRAUS and another, trading as R. H. Macy & Co.,
Defendants-Respondents.

No. 204.

APPELLANTS' BRIEF.

I.

Statement of the Case.

This is an appeal by the complainants from a judgment of the United States Circuit Court of Appeals for the Second Circuit, filed June 29th,

1906, affirming a decree dismissing the bill of complaint, entered August 12th, 1905, in the U. S. Circuit Court for the Southern District of New York, in Equity, Hon. George W. Ray, District Judge, presiding.

This is a suit brought in Equity to restrain the defendants from infringing complainants' copyrights by selling complainants' copyrighted books without complainants' license at lower prices than the prices fixed by complainants, and also to restrain defendants from contributory infringement of such copyrights by inducing jobbers and wholesale dealers in books to violate agreements made by them with complainants as to the sale of complainants' copyright books.

The question involved is whether upon the facts the Court erred in dismissing the bill of complaint.

The question of law may be briefly stated thus:

Where the proprietor of a copyright sells copies of his copyrighted book by a conditional sale, subject to a restriction upon further sale, and to a purchaser who agrees to comply therewith, are these copies of the book released from the monopoly as against persons having notice of the restriction?

Statement.

The plaintiffs' contention is twofold: There was

1. *Direct infringement* in that they have sold their copyright books only by restricted sales subject to a restriction as to resale, and to vendees who agreed to such restriction, that the defendants, with full knowledge of the restrictions, have purchased from such vendees and have resold the books in violation of the restriction.

2. *Contributory infringement* in that the defendants have intentionally induced the complainants' vendees to violate restrictions imposed upon them by the complainants as to the resale of complainants' copyrighted books.

The Circuit Court of Appeals decided that there was no direct infringement as matter of law and no contributory infringement as matter of fact.

There was no direct infringement because "a violation of the restrictions attempted to be imposed upon sales of copyrighted books is not an infringement of copyright." There was no contributory infringement because there was an "absence of proof of any reservation of right in the copyright by its owner, or of an agreement by the dealers from whom defendants purchased to abide by said rules, or of a wrongful attempt on the part of defendants to induce its vendors to break any contract" (147 Fed., 32).

It is respectfully contended that this rule of law laid down by the learned Court below was erroneous, and that the finding of fact was so clearly erroneous as to require reversal by this Court.

The Facts.

As to most of the facts there has been no dispute. They are established by admissions in the answer, by stipulation and by uncontradicted testimony, the defendants calling no witnesses.

The facts are as follows:

The complainants under the firm name of Charles Scribner's Sons are and have for many years been publishers in the City of New York and have published large numbers of books under the protection of the copyright law. The defendants, under

the name of R. H. Macy & Co., carry on a department store, where they sell books, including the copyright books of the complainants. Prior to the year 1900, Charles Scribner's Sons and other publishers were accustomed to offer books at prices known as list prices, and sellers of such books at retail sometimes charged such list prices for them, and sometimes allowed discounts and rebates which varied with different purchasers.

Bill I, II, III, Ans. II.

This system of selling books was unsatisfactory to the trade and the public,

Bill IV, Kinnear, Qs. 12-14, p. 42, Ex. 1, p. 82,

and in 1900 certain publishers formed the American Publishers' Association and adopted rules intended to prevent the cutting of the retail prices fixed by the different publishers, each for the copyright books published by him.

This association and its members deal freely and indiscriminately with all jobbers and dealers who comply with the rules of the association.

Bill IV, Ans. III; Bill V, Ans. IV; Plan, pp. 37-39; Ex. No. 7, p. 90; Ex. No. 1, p. 82; Kinnear, Qs. 12-16, p. 42; Ans., Separate Defense, 97, 98, 99.

The opinion of the Circuit Court of Appeals in effect holds that it is not shown that all sales by the complainants were restricted sales, as alleged in the complaint, and, therefore, that the defendants might have received their supply of books either from unrestricted vendees or from their subvendees.

It is possible to arrive at this conclusion only by disregarding the pleadings, to which we beg to call especial attention.

Bill of Complaint.

"VI.—From and after the adoption of the said rules your orators have at all times refused and now refuse to sell without restriction any of the copyrighted books published by them and affected by the said rules, except such of said books as have been sold by your orators, at retail, for the full "net price" fixed for such books respectively. Excepting the sales so made—at retail for the full net price, your orators have sold none of the copyright books so as aforesaid published by them including the copyright books hereinafter particularly specified, except [upon the condition and] with the restriction that the purchaser of such books should take and hold the same subject to the said rules of the American Publishers' Association and your orators have sold copyright books published by them to those booksellers only who would maintain the retail price of such net copyrighted books fixed by your orators, for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them

Answer.

"V.—*These defendants admit*, on information and belief, that the *complainants have made all sales of books subject to the rules of American Publishers' Association, as set forth in Paragraph VI of the bill of complaint*, but they deny that any of said sales were conditional sales, and they deny that in any such sales there was any reservation to the complainants of an interest in such books sold, or any reservation of any rights secured by the copyright covering the same" (p. 95).

(The last two sentences do not deny any allegation of fact in the bill of complaint.)

to cut or sell at a lower figure than such retail price, or whose name should be given to them by the said American Publishers' Association, as one who cut such net prices, and who would not sell copyrighted works of fiction (not net) published after February 1st, 1902, within a year of publication at retail at a discount exceeding 28 per cent. from the price fixed by the purchasers, and your orators say that except for the above-mentioned sales by them at retail at net prices, they have not sold any of their said net copyrighted books and copyrighted books of fiction published after February 1st, 1902 (including those hereinafter specified), by an unrestricted sale, and [that they have sold such books only to jobbers and dealers on condition that prices be maintained as provided by the regulations of the American Publishers' Association"] (p. 3).

Thus the foregoing allegations in Paragraph VI of the complaint, except the words enclosed in brackets, *are not denied and are, on the contrary, expressly admitted.*

"IX.—That except sales made by your orators at retail for net prices, all sales of the said copyright books, to wit: 'In the Grip of the Mullah,' &c., &c., have been restricted sales made as aforesaid subject to the said regulations of the American Publishers' Association and to such booksellers only who would maintain the retail net prices as provided by the said regulations and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such retail price, or whose name should be given to them by the Association as one who cuts such net prices; and your orators have at all times refused to sell to any one any of the above enumerated copyright books, without restriction, except such as your orators have sold, at retail at 'net' prices as above set forth. All others of the above enumerated copyright books which have been sold by your orators have been sold by them on the conditions and subject to the restrictions and upon the agreement as to sale at

"VII.—These defendants furthermore admit that the complainant made sales of said described books in accordance with the rules and regulations of the American Publishers' Association, as set forth in Paragraph 14 of said bill of complaint, but these defendants have no information sufficient to form a belief as to whether the complainants have at all times refused to sell to any one any of said books and, therefore, deny said allegation, and these defendants have no knowledge or information sufficient to form a belief as to whether every purchaser of such books had at the time of purchase full and complete notice of the condition upon which said books were sold, or accepted the same as alleged in Paragraph IX, and, therefore, require proof thereof * * *" (p. 96).

retail prices above set forth, and every purchaser of such books from your orators (except purchasers at retail at 'net prices') [at the time of purchase] from your orators and has since had full and complete notice of the conditions upon which said books were sold [and has accepted the same under the said conditions and has always been bound to fulfil the terms thereof]. * * *"

All the foregoing allegations of Paragraph IX of the complaint, except the words included in brackets, are wholly undenied and are expressly admitted by the answer.

See also subdivision 6 of the Answer (p. 98): "6, and defendants say that in pursuance of said unlawful agreement, neither of said Associations nor any of the members thereof, including the complainants, would or will now sell or supply *any books, at any price, to any dealer* in the State of New York, or elsewhere in the United States whether a member of said Association or not, and whether such books were copyrighted or not, or were or were not published by the said American Publishers' Association

> or its members, *who did not maintain said arbitrary retail price on copyrighted books or who would resell, or was suspected of reselling, suspected of reselling, such copyrighted books to any dealer who thereafter sold the same at less than the arbitrary price* fixed by said unlawful combination."
>
> (This portion of the answer, while stricken out as a pleading, remained a formal and precise admission under oath.)

It is established by the pleadings that every sale by the complainants to wholesale dealers and jobbers of the books mentioned in the complaint was a restricted sale. The restriction was violated by sales at wholesale to R. H. Macy & Co. and other price-cutters. It was stipulated in the action that R. H. Macy & Co. purchased day by day large quantities of these books at wholesale, at wholesale prices from wholesale dealers (pp. 78-82).

Hence, it was established by the pleadings and by stipulation that the defendant purchased the complainants' copyrighted books in violation of the restriction under which they had been sold by complainants.

The learned Judges who wrote in the courts below, disregarded the admissions in the answer, treated all the allegations of the complaint as put in issue and then dismissed the bill of complaint because the complainants had not established by testimony allegations which stood admitted on the record.

That the defendants with notice purchased the books in violation of the restriction was enough

(if the authorities in patent cases apply) to show infringement. To bring the case within the authorities as to contributory infringement it was necessary to show that the defendants intentionally aided the dealers to make unlawful sales of the copyright books.

Starting with the fact that all the wholesale dealers were bound by the restriction, it appears unmistakably that the defendants intentionally led them to disregard the restriction. It is not necessary to identify all these dealers.

New Jersey Patent Co. v. *Schafer*, *144 Fed., 437.*

Wells & Richardson v. *Abraham*, *146 Fed., 192-196, aff'd C. C. A.*

Authors & Newspaper Association v. *O'Gorman Co.*, *147 Fed., 616, 620.*

Ten dealers had their supplies of books cut off for selling books to the defendants (Q. 117, p. 51). Miss Kinnear refused to tell the source from which she obtained books (Q. 104, p. 50), but she said the books were bought "from people who knew the price for which Miss Kinnear bought them, who knew Miss Kinnear and the position which she occupied and who were willing to take the risk of incurring the displeasure of the combined publishers and combined booksellers for the profits which she offered them" (Q. 97, p. 49). The defendants made their purchases entirely through secret ways (Qs. 64-66, p. 46). In 1901, when the rules of the American Publishers' Association went into effect, the defendants adopted a new method of bookkeeping in the book department, they ceased to record the names of the persons from whom they purchased books, making false entries that the books were purchased from defendants' agent, and they destroyed all bills when paid (pp. 28, 29).

The defendants knew that every bookseller must before he could buy books be bound by a pledge to observe the rules of the American Publishers' Association, and they brought an action in the New York Supreme Court to enjoin the Association and its members from enforcing its rules (p. 31).

Defendants advertised in the papers that "all other dealers were compelled to charge the prices fixed by the rules" (p. 64).

It is impossible to doubt upon this uncontradicted evidence of their own manager that the defendants acted wrongfully and intentionally in inducing certain wholesale dealers (who were all, as the answer admits, bound by the restricted sales) to disregard the restrictions and thus to make sales which, as to the wholesale dealers, were unlawful.

The evidence offered by the complainant was in complete harmony with the allegations of the complaint.

All the books mentioned in the complaint were sold by Charles Scribner's Sons at wholesale, subject to the rules of the American Publishers' Association and to persons who were obeying those rules. All these purchasers, at the time of each purchase, received notice upon the catalogues and bill-heads of Scribner & Co., as follows:

> "Copyrighted net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association" (pp. 68-69, 94).

Every purchase from Charles Scribner's Sons was, therefore, not merely a restricted sale, as is admitted by the answer, but also in terms a conditional sale.

When a new dealer came to deal with Charles Scribner's Sons, they referred his name to the American Publishers' Association for investigation

and sometimes sent him for signature an agreement to comply with the rules of the Association (p. 68). If the Association detected a price-cutter they informed Charles Scribner's Sons, who thereupon ceased to deal with him (fol. 97, p. 70). If Charles Scribner's Sons detected a price-cutter they ceased to deal with him until the Association reported that he had given definite assurance that he would maintain prices for the future. This was an invariable rule never broken (pp. 70, 71).

It is admitted by the answer that except for books sold at retail by Charles Scribner's Sons all others of the enumerated copyrighted books which were sold by Charles Scribner's Sons were sold by them on the conditions and subject to the restrictions and upon the agreement as to sale at retail prices in the bill of complaint set forth (p. 34) and it was not necessary to show in what manner each wholesale dealer obtained notice of the restrictions. When the rules were established the trade generally conformed to them (Emory, pp. 64, 56, Answer, subdivisions 5, 6, p. 98), and thus in the great majority of cases no written agreement was signed. Ninety-five per cent. of the publishers and 90 per cent. of the booksellers at wholesale and retail were members of the Associations and thus bound by the rules without the signature of any paper (Answers 1, 5, pp. 97, 98), and no dealer was supplied who did not acquiesce in the rules (Answer 6, p. 98).

To a new comer in the trade, the agreement, Defendants' Exhibit A, was sometimes sent. If he refused to sign the agreement and disobeyed the rule he was cut off. If he refused to sign but continued to keep up prices he was as a rule cut off, but there were one or two cases in which men refused to sign, but did not cut prices, when the Association waived their disinclination to sign the agreement (Emory, pp. 64, 65, 56).

Such persons clearly had notice of the rules and as they took the goods with notice of the restriction on the sale, receiving the billheads on which compliance with the rules was made a condition of the sale, they were bound by acquiescence as completely as if they had signed the paper, Exhibit A.

It is not shown whether or not they verbally agreed to comply with the rules, but, whether they were bound by acquiescence, or by a verbal agreement, or by some other writing than Exhibit A, the certain thing is that they were in fact bound, because the answer admits that *all sales* made by Scribner & Co. were made "on the conditions, and subject to the restrictions, and upon the agreement as to sale at retail prices" in the bill of complaint set forth and subject to the rules of the American Publishers' Association.

Thus the fact that certain dealers received books after refusing to sign the agreement, Exhibit A, does not show that they held books free from the restriction or that Macy & Co. could buy from them or from their sub-vendees without violating complainants' rights.

It is only by disregarding the admissions in the answer that the Court could hold that Macy & Co. could lawfully buy from the dealers who declined to sign Exhibit A or from their sub-vendees; but it is further to be noted that there is no claim by the defendants that they made purchases from such dealers or such "sub-vendees."

The purchases up to January 1st, 1904, are specified and it is stipulated that they continued after January 1st, 1904, 90 per cent. of the purchases being made from day to day, "*at wholesale from wholesale booksellers at wholesale prices*" (pp. 78-81). Ten of these dealers named in the evidence were on account of their dealings with Macy & Co. "put on the cut-off list" of persons to whom the

members of the Association were not allowed to sell books (Q. 117, p. 51, p. 79; R. D. Q. 158, p. 65, x-Q. 63-66, p. 57).

It is submitted that this makes a *prima facie* case that Macy & Co. dealt with persons who purchased directly from the complainants. It would have been easy for Miss Kinnear to testify that she had no such dealings if such were the fact, but she refused to answer questions on the subject and no evidence whatever was given by the defendants.

Every purchaser from the Scribners took the goods with notice that they were sold to him on conditions.

The complainants copyrighted certain books and fixed the retail prices of them. A list of the titles, the dates of filing the titles and the price fixed is as follows:

1. "In the Grip of the Mullah,"
   September 16, 1903 ....net price $1 20;
2. "Vacation Days in Greece,"
   16th September, 1903...net price 2 00;
3. "The Vagabond,"
   2d September, 1903, $1.50, 28% off 1 08;
4. "Gordon Keith,"
   15th May, 1903, $1.50, 28% off.. 1 08;
5. "The Little Shepherd of Kingdom Come,"
   2d December, 1903, $1.50, less 28% 1 08;
6. "Colonel Carter's Christmas,"
   30th September, 1903, $1.50, less 28% 1 08;
7. "Our Feathered Game,"
   26th June, 1903 .....net price 2 00;
8. "The Meaning of Pictures,"
   12th February, 1903....net price 1 25;
9. "The Better Sort,"
   26th February, 1903....net price 1 25;
10. "The Turquoise Cup and the Desert,"
    25th February, 1903....net price 1 25;

11. "Horses Nine,"
    12th March, 1903.....net price $1 25;
12. "The Principles of Money,"
    14th March, 1903.....net price 3 00;
13. "The House on the Hudson,"
    26th March, 1903.....net price 1 50;
14. "No Hero,"
    9th April, 1903.....net price 1 25;
15. "Our Northern Shrubs,"
    9th April, 1903 .....net price 2 00;
16. "Middle Aged Love Stories," 22d
    April, 1903 .....net price 1 25;
17. "Trees, Shrubs and Vines,"
    22d April, 1903.....net price 1 50;
18. "The Modern Obstacle,"
    29th April, 1903.....net price 1 50;
19. "Letters of a Diplomat's Wife,"
    15th May, 1903.....net price 2 50;
20. "The Under Dog,"
    15th May, 1903.....net price 1 50;
21. "A Doctor of Philosophy,"
    2d September, 1903.....net price 1 25;
22. "In the War with Mexico,"
    17th September, 1903..net price 3 00;
23. "Foes of the Red Cockade,"
    16th September, 1903...net price 2 00;
24. "Poems" by Josephine Daskam,
    22d October, 1903.....net price 1 25;
25. "In African Forest and Jungle,"
    30th September, 1903...net price 1 25;
26. "The Blood Lilies,"
    9th October, 1903.....net price 1 50;
27. "The Weaker Sex,"
    19th October, 1903.....net price 4 20;
28. "Reminiscences of the Civil War,"
    15th October, 1903..... 3 00;
29. "With the Allies to Pekin,"
    16th September, 1903...net price 1 25;

30. "Through Three Campaigns,"
16th September, 1903...net price $3 00;
31. "My Wonderful Visit,"
30th September, 1903...net price 1 20;
32. "Old London Silver,"
15th October, 1903.....net price 12 50;
33. "Odd Craft,"
16th October, 1903.....price 1 50;
34. "The Development of the Drama,"
12th September, 1903...net price 1 25;
35. "The Daughter of a Magnate,"
9th October, 1903.....price 1 50;
36. "Sanctuary,"
22d October, 1903.....price 1 50.

Bill VIII, Ans. VII.

These books (except those sold by complainants at retail) have been sold by the complainants only by restricted sales and upon condition that the rules of the American Publishers' Association should be obeyed, and that the jobbers should not sell to known price cutters. These conditions and restrictions were fully known to every jobber and wholesale dealer when he bought the books and he acquiesced in and agreed to the restriction and condition.

Bill IX, Ans., Second paragraph marked VII; Stolle, pp. 66-71; Exhibit No. 9, p. 92; Ex. No. 10, p. 94; Ex. A, p. 94; Ans., Paragraphs 2, 3, 6, 7.

The defendants with full knowledge of the rules and regulations of the American Publishers' Association, and that the complainants have at all times refused to sell their copyrighted books except either at retail for the full retail prices mentioned, or else not unconditionally but only upon the conditions and with the restrictions above mentioned as to re-

sale, and on condition that prices be maintained as provided by the regulations of the American Publishers' Association, and well knowing the net prices fixed for the copyrighted books, obtained from jobbers and exposed for sale the books at prices less than those fixed by complainants, and induced and persuaded some of the jobbers and wholesale dealers to violate their agreement with Charles Scribner's Sons, and to sell the books to R. H. Macy & Co. in violation of their agreements.

Bill X, Stipulation, pp. 78-81; Kinnear, pp. 41-52; Emory, 54, 55, 57, 57-58, 60, 65, 66, 91; Tessaro, 76, 77; Ex. 3, p. 85; Ex. 4, p. 86; Ex. 5, p. 87; Ex. 9, p. 92; Ans., 2, 3, 6, 7, 8, 14, p. 100.

The knowledge of the defendants of the rules and regulations of the American Publishers' Association admitted by the answer is shown by the proofs to have been very full and detailed. At the time when the association was organized R. H. Macy & Co. refused to be bound by its rules and advertised themselves in the daily press as ready to sell books at cut prices in defiance of the wishes of the publishers. Some of these advertisements beginning in 1902, and continuing into 1904, after issue joined in this suit, were produced in evidence. It is explicitly stated that all other dealers are bound by contract to maintain prices and that Macy & Co. alone charge a lower price. This fact is used by way of advertisement; copyrighted books being of uniform quality furnish the best test of cheapness, which test, according to the advertisements, is to be applied to other lines where it is more difficult for inexperienced people to judge of quality (pp. 85, 88; Kinnear, p. 49-50). Over the book counter of R. H. Macy & Co. appeared signs "The book trust has not yet driven

us out of business. We sell books cheaper than any other house." "All (net) books sold ten per cent. less than other houses." "All new fiction 98 cents. Sold elsewhere $1.08" (p. 76).

Some of the copyrighted books described in the bill of complaint were bought by Macy & Co. from the complainant's store at retail and were sold by Macy & Co. at a loss, for much less than retail prices (p. 46). Ninety per cent. of the books were purchased at wholesale prices (Stipulation, 78-82). (The Court will please note that the purchases of these books continued after January 1, 1904, although the details of the purchases after that date are not given, pp. 78, 79.)

All these books were sold by Macy & Co. at less than the net prices or the discount prices fixed by Charles Scribner's Sons.

Stipulation, p. 78; Kinnear, 43-44; Advertisements and signs above mentioned.

R. H. Macy & Co. began a suit in the Supreme Court of New York against American Publishers' Association and some of its members and others, asking for an injunction restraining the enforcement of rules of the association. It was claimed in that suit that the American Publishers' Association was unlawful under the Federal and State statutes against monopoly. In the course of this litigation the defendants Straus became intimately acquainted with the American Publishers' Association, its rules and methods of transacting business (Kinnear, pp. 43-44, 42, 46, 48, 49).

Demurrers to the complaint were sustained at Special Term.

On appeal to the Appellate Division the judgment was reversed and the demurrers overruled, VAN BRUNT, *P. J.*, and MCLAUGHLIN, *J.*, dissenting.

It was held by the majority of the Court that according to the complaint the American Publishers' Association was an unlawful combination under Chap. 690, Laws of 1899, which is the Anti-Monopoly Statute of the State of New York.

It was also held that the fact that the arrangement related to copyrighted books did not render the combination lawful as the copyright law does not give the publisher any right to control the resale of the book after it has once been sold by him.

Straus vs. *Am. Publishers' Assn.*, 85 *App. Div.*, 447.

Upon appeal to the Court of Appeals, the Court unanimously disapproved this view and held that the rules in question were lawful under the copyright statute, but a majority of the Court affirmed the order appealed from, on the ground that the rules *also limited the sale of uncopyrighted books*, as to which the publishers have no monopoly and that the rules were for that reason obnoxious to the State statute.

Straus vs. *Am. Pub. Assn.*, 177 *N. Y.*, 473.

Thereupon the American Publishers' Association amended its rules so as to strike out all reference to uncopyrighted books, and, by way of answer, pleaded the amended rule as a defense to the action. A demurrer to this defense was interposed, and was overruled by BLANCHARD, *J.*, who held the defense to be a good defense on its face to the cause of action.

Straus vs. *Am. Pub. Assn.*, *N. Y. Law Journal, Nov. 29, 1904; affirmed, 103 App. Div.*, 277.

All the paragraphs of the defendants' answer in the suit at bar after Paragraph XI were stricken

out as impertinent by Judge LACOMBE, whose opinion was reported.

Scribner vs. *Straus, 130 Fed., 389; Record, p. 101.*

Upon application for a preliminary injunction Judge LACOMBE denied the motion, handing down an opinion:

> "There is no dispute about the facts and apparently there would be no fuller presentation of them at final hearing. Under such circumstances it is not unusual to discuss all the legal questions presented and to decide the whole case on motion for preliminary injunction. The main point presented although now quite well settled in the case of a patent, is a novel question in copyright law. While the two kinds of property, patent right and copyright, have many characteristics in common, there are differences which make it a fairly arguable question whether the analogy is strong enough to warrant the application of the same doctrine in both cases. The decision of such a question should be rendered under conditions which would leave the defeated party, whichever it might be, to secure a comprehensive review by appeal to the Court of last resort.
>
> Under the existing practice such a review could not be secured on a decision for preliminary injunction, and, for that reason, without now passing upon any of the questions presented, the motion is denied."

The case came on for final hearing before Hon. GEORGE W. RAY, on January 17th, 1905 (p. 107). An opinion was filed July 11, 1905, and a decree dismissing the bill of complaint was entered on August 12, 1905 (pp. 102-106).

139 Fed., 193.

The plaintiff appealed to the Circuit Court of Appeals (pp. 107-115), which affirmed the decree,

DARK PAGE BLEED THRU

Judge TOWNSEND writing the opinion (pp. 115-120).

The complainant appealed to this Court and the appeal was allowed by Judge TOWNSEND (pp. 120-127).

The complainants do not in this suit ask for relief with reference to the acts of the defendants in dealing with those copies of copyrighted books which have been sold at retail either by the complainants or by their vendees. It is assumed that these have passed out of the monopoly.

The argument in this brief is intended to apply to the books not acquired by defendants by purchase at retail.

BRIEF OF THE ARGUMENT.

Specification of Errors.

The decree is alleged to be erroneous because it affirmed the decree of the Circuit Court, whereas it should have reversed that decree and should have awarded relief to the plaintiffs.

FIRST.—The Court erred in finding that the complainants admitted that no other method was taken to bring the rules of the Association to the notice of purchasers in the wholesale department, and that they could not say whether or not these rules were in one way or another brought to the attention of every purchaser by the wholesale department.

SECOND.—The Court erred in finding that the complainants admitted that if dealers were asked to sign a notice and refused to sign it, the trade was still allowed to sell to them and would sell to them.

THIRD.—The Court erred in deciding that the claims arising out of the peculiar rights attached to articles made by secret processes, or statutory rights of articles protected by patents or copyright, do not directly bear upon the question raised herein.

FOURTH.—The Court erred in holding that the question of liability of the defendants is not one of infringement of copyright.

FIFTH.—The Court erred in deciding that the evidence fails to show that defendants have wrongfully induced any person to break his agreement with complainants.

SIXTH.—The Court erred in deciding that it nowhere satisfactoriiy appears that defendants purchased from the complainants' vendees or from any one who made any contract to obey said rules.

SEVENTH.—The Court erred in deciding that books may have been lawfully sold and bought upon an express refusal to sign said pledge.

EIGHTH.—The Court erred in holding that there was no foundation for claim of contributory infringement of copyright.

NINTH.—The Court erred in deciding that the principles stated in Bobbs-Merrill Co. against these defendants, 147 Fed. Rep., 15, namely, "that a violation of the restriction attempted to be imposed upon sales of copyright books is not an infringement of copyright," are applicable to the facts proven herein.

TENTH.—The Court erred in affirming the decree of the Court below dismissing the appeal of complainants.

POINT I.

This case is distinguished from Bobbs-Merrill Co. v. Straus (147 Fed., 15) upon the facts.

The principle that "a violation of the restriction attempted to be imposed upon sales of copyrighted books is not an infringement of copyright" is discussed in the opinion in the case of *Bobbs-Merrill Company* v. *Straus* (147 Fed., 15), and it should be pointed out *in limine* that some of the essential facts which led to the application of the principle to that case are absent from the case at bar.

In the Bobbs-Merrill case there was an absolute sale of the copyrighted books with a notice on the page following the title page, as follows:

> "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.
>
> THE BOBBS-MERRILL COMPANY."

"The disposition of the questions raised * * * depends upon the effect to be given to the terms of the printed notice."

"It will be observed," says Judge TOWNSEND, "that this statement is a notice, not a contract. There is no reservation of title to, or of any interest in, or subsequent control over the property sold; no suggestion of any agreement on the part of the purchaser, or restriction upon, or provision for forfeiture of title, no attempt to provide that a purchase shall constitute an acceptance of the terms stated in the notice. In fact, as already shown, it is conceded that the dealers to whom complainant sold the books were under no agreement or obligation to enforce the observance of the terms of the said notice, or to restrict their sales to such

retail dealers as would agree to observe said notice."

Bobbs-Merrill Co. vs. *Straus*, *147 Fed., 27.*

So, in stating why the rules in patent, secret process and copyright cases did not apply to the Bobbs-Merrill case, the learned Judge says (*147 Fed., p. 24*):

> "An examination of the cases under the above heads shows that they have generally been disposed of upon the ground that there was a contract between the original vendor and vendee, or that conditions were imposed or rights asserted, which, in each case, were brought home to the knowledge of a subsequent vendee, and when the right was sustained by virtue of the inherent character of the article, as in the secret processes, or by virtue of the specific statutory protection, as in the case of patents and copyrights."

In these essential particulars the case at bar differs from the Bobbs-Merrill case. The Scribners made a restricted sale, retaining a control over the retail price. The maintenance of this price was by the bill-heads made an express condition of the sale. The dealers to whom the Scribners sold were under an absolute obligation stated in the admitted portions of paragraphs VI and IX of the bill of complaint and stated in the answer as follows:

> "Neither of said associations, nor any of the members thereof, including the complainants, would or will now, sell or supply any books at any price to any dealer * * * who did not maintain said arbitrary retail price on copyrighted books, or who would resell or was suspected of reselling such copyrighted books to any dealer who thereafter sold the same at less than the

arbitrary price fixed by such unlawful combination" (*Record, p. 98*).

There was a contract between the Scribners and the original vendees, conditions were imposed and rights asserted which in each case were brought home to the knowledge of Macy & Co. and the complainants assert their right by virtue of the specific statutory protection of the sole liberty of vending under the copyright law.

In the *Bobbs-Merrill* case, it was held that the mere printing of the notice did not make the sale by complainants a restricted or conditional sale and it was conceded that the dealers to whom complainant sold the books were under no agreement or obligation to restrict their sales.

In the *Scribner* case the answer admits that the sales by the Scribners were restricted sales, it is shown by uncontroverted proof that they were expressly made on condition and it is conceded and expressly alleged by the defendants that the purchasers from the Scribners were under obligation to restrict their sales.

In the opinion of the Circuit Court of Appeals in the *Bobbs-Merrill* case on pages 17, 18 and 19 (147 Fed.), it is argued that when a copyright is taken out, the common law right of an author in his unpublished manuscript to prevent the publication thereof is at an end and he must rely exclusively upon the protection given by the statute.

Whatever may have been the attitude of counsel in the Bobbs-Merrill case, in the case at bar this proposition has not been questioned.

The owner of a copyright has no protection except from the statute. The only question here is as to the rights given by the statute.

POINT II.

The multiplication of copies by printing is not the sole right given by the copyright statutes.

> "That this (the multiplication of copies) is the sole right conferred by statute, as distinguished from such common-law rights as inhere in the ownership of other property, is evident from the language of the statutes, and from the decisions."
>
> *Bobbs-Merrill Company* v. *Straus*, *147 Fed., 19.*

It is respectfully submitted that this is erroneous, and that this error affects the whole decision of the learned Court below.

The language of the statute is substantially the same as the language of the patent statute. The "sole right to vend" a patented article has been by the courts declared to be a very different right from the common-law right of the owner of ordinary property to vend it. Hence it is not "evident from the language" of the copyright statute that the words "the sole liberty of vending" are meaningless, giving no rights to the owner of a copyright, which he would not have had by common law if these words had been omitted.

> "A copyright, as the term imports, involves the right of publication and reproduction of words of art or literature.
>
> A copyright, as defined by Bouvier's Law Dictionary, Rawle's Edition, Volume 1, p. 436, is 'The exclusive privilege, secured according to certain legal forms, of printing or otherwise multiplying, publishing and vending copies of certain literary or artistic productions.' And further, says the same author, 'the foundation of all rights of this description is the natural dominion which everyone has over his own ideas, the enjoy-

ment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others.' That is, the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced."

* * * * * *

"Under this grant of authority, a series of statutes have been passed having for their object the protection of the property which the author has in his right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting this purpose." * * *

Am. Tobacco Co. v. *Werckmeister, 207 U. S., 284.*

"The Copyright Acts substantially give the following additional rights: To copyright and thus secure the sole privilege of unlimited multiplication and sale of copies, to sell or transfer the unlimited right of reproduction, sale and publication, the limited right of serial publication, the right of publication in book form, the right of translation, the right of dramatization, or one or more of these rights in specific territory, and the right to secure a copyright either generally, or in one or more countries whose laws permit it, either in the name of the author or assignee. Also the right to the author to license the sale or other restricted enjoyment of some lesser right, without the power to copyright."

SANBORN, *J., Harper Bros.* v. *V. M. Donohue & Co., Fed. 491.*

The primary meaning of the word "copyright" is, of course, the right to copy. The right to multiply copies after publication is solely a creation of the copyright statutes and is peculiar to those statutes.

The authorities cited by Judge TOWNSEND (147 Fed., 19, 20) so hold, but they do not establish the entirely different proposition that the right to multiply copies is the sole right given by the statutes.

The right to sell copies is equally granted.

We contend that the rule is the same as in patent cases.

> "The patent grants an exclusive right to use, to make and to sell. The patentee may grant, if he will, an unrestricted right to make and sell or use the device embodying his invention or may grant only a restricted right in either the field of making, using or selling. To the extent that he restricts either one of these separable rights, the article is not released from the domain of the patent and anyone who violates the restrictions imposed by the patentee, with notice, is an infringer."
>
> *John D. Park & Sons Co.* v. *Hartman*, *153 Fed., 24, 27.*

> "To the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly."
>
> *Nat. Phonograph Co.* vs. *Schlegel, 128 Fed., 733, 735.*

POINT III.

The right of the owner of an article in which he has a monopoly, to sell the article with a valid restriction upon its use or future sale, has been established in patent cases.

The law has been well stated by the Circuit Court of Appeals in the Seventh Circuit.

Victor Talking Machine Co. vs. *The Fair, 123 Fed., 424; 61 C. C. A., 58.*

So in *National Phonograph Co.* vs. *Schlegel*, the Court of Appeals in the Eighth Circuit, speaking by VAN DEVANTER, *J.*, say:

> "An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly."
>
> *128 Fed., 733, 735.*

The rule has been stated in *Robinson on Patents*, in a section which has received judicial approval, as follows:

> "Not only may the patentee *impose conditions limiting the use of the patented article upon his grantees* and express licensees, but any person having the right to sell may at the time of sale restrict the use of his vendee within specific boundaries of time or place or method, *and these will be the meas-*

ure of the implied license arising from the sale."

Robinson on Patents, Sec. 824.

In *Edison Electric Light Co.* vs. *Peninsular Light, Power and H. Co.*, decided by the Circuit Court of Appeals in the Sixth Circuit, it was said:

> "To restrict the *right of a purchaser* of an apparatus embodying a patented invention to use it for the purposes for which it is peculiarly adapted, there must appear *some express or implied agreement by which the mode or time or place of use has been limited."*
>
> *101 Fed., 836; 43 C. C. A., 479.*

In *Edison Phonograph Co.* vs. *Kaufmann, 105 Fed., 960*, Judge ATCHISON said:

> "I cannot doubt that the complainants have the right *to sell their* patented phonographs *with the restrictions and upon the conditions* contained in the jobber's agreement, and that dealers buying the patented instrument from the jobber with notice of these conditions and restrictions are bound thereby."

To the same effect is *Edison Phonograph Co.* vs. *Pike, 116 Fed., 863.*

The vendors put upon the box containing the phonograph, the following:

> "Notice to dealers. This record is sold subject to restrictions as to the persons to whom and the prices at which it may be sold. Any violation of such restrictions makes the seller or user an infringer of the Edison patents."

There was here no reservation of title, only a notice of restriction upon the sale.

The "jobber's agreement" related to cutting prices, and this case is closely in point.

In *Dickerson* vs. *Matheson, 57 Fed., 524; 6 C. C. A., 466,* the Court of Appeals in the Second Circuit held that when goods purchased abroad with notice that they were not to be imported into America were sent here, the American patent was infringed. In that case the notice was contained in a bill of sale, and was in these words:

> "The importation into the U. S. of North America of our patented substantive cotton dye stuffs Congo, benzo purpurine, &c., is forbidden."
>
> *57 Fed., 526.*

In form this was a mere prohibition, less than a condition of sale. The title of the purchaser was absolute except so far as it was affected by notice of the prohibition.

So the Court of Appeals in the Eighth Circuit, in *Dickerson* vs. *Tinling, 84 Fed., 192, 195; 28 C. C. A., 139,* following *Dickerson* vs. *Matheson,* said:

> "If the corporation sold the patented article *subject to such restriction, the purchasers with notice of this limitation* whether immediate or remote *could acquire no better right than strangers to infringe upon the monopoly secured by the patent. That monopoly would still remain intact* and purchasers of the phenacetine which has been sold under the *restriction must be liable for its use and sale* in the United States *to the same extent as those who made it or bought it of strangers within their limits.*"

In this case the packages of phenacetine bore a notice prohibiting the importation of the article into the United States.

And see

> *N. J. Patent Co.* vs. *Schaefer, 144 Fed., 457.*

In the opinion of the Circuit Court of Appeals Judge TOWNSEND suggests that the notice published by Chas. Scribner's Sons Co. was defective

because it did not expressly reserve right in the copyright, but it is apparent that no such rule has been established in the patent cases.

The retention by the patentee of a part of his monopoly does not depend upon the mere form of the contract by which he parts with the possession of the patented article. If that contract be an unrestricted sale, then, indeed, the article sold passes out of the monopoly, but there may be a conditional sale or a restricted sale or a license or a contract of agency or the like, and in all these cases, without regard to the form of the transfer, the patentee may invoke the patent law if the conditions or restrictions be disregarded (*Nat. Phonograph Co.* vs. *Schlegel, supra*).

See also

Heaton Peninsular Button Fastener Co. vs. *Eureka Specialty Co.*, *22 C. C. A., 267; 77 Fed., 288.*

Bement vs. *National Harrow Co.*, *186 U. S., 70.*

Cortelyou vs. *Lowe*, *111 Fed., 1005; 2d Circ.; 49 C. C. A., 671.*

John D. Park's Sons Co. vs. *Hartman (C. C. A.)*, *153 Fed., 24.*

In England, the same rule is applied in patent cases:

Badische Anilin & Soda Fabrik v. *Isler*, *75 L. J. R., Ch., 411; (1906) 1 Ch. 605; 94 L. T., 367; affd., 75 L. J. Ch., 749; (1906) 2 Ch., 443.*

Citing

The Incandescent Gaslight Co., Ld., v. *Brogden*, *16 Rep. Pat. Cases, 179.*

And, also in Equity,

National Phonograph Co., Limited, v. *Edison-Bell Cons. Phonograph Co., Limited, Court of Appeal, The Times, Dec. 19, 1907.*

It will be noticed that both from the language of the opinions and from the facts of the different cases cited no particular form of restriction is necessary to accomplish the purpose. The question does not turn upon the particular words used by the patentee to create a restriction. The line is not drawn between sales and agencies or sales and mere licenses, but between *unrestricted* sales on the one side and, on the other, all contracts of whatever kind which limit or restrict the ordinary power of the vendee to do what he will with his own. This is true even when the restriction is imposed by a mere notice and there is no proof of an agreement by the first purchaser from the patentee.

In the cases above cited a mere notice that a particular use of the patented article sold is prohibited has been given the same effect by the Courts as the most elaborate agreement affixed to the patented article and intended to retain or to revest in the patentee the title to it.

Agreements, written or oral, express or implied, "conditions," "limitations," "restrictions," "prohibitions," are all recognized and given like effect as reservations of a portion of the monopoly, although the article, which is the subject of it, is transferred to a purchaser.

POINT IV.

Macy & Co. not only sold the plaintiffs' books without a license, but they induced jobbers and booksellers to break their contracts with the complainants touching the monopoly of their copyrights.

This brings the case within the rule of contributory infringement established in patent cases.

6th Circ., Heaton Peninsular Button Fastener Co. vs. Eureka Specialty Co., 77 Fed., 288; 25 C. C. A., 267.

Cortelyou vs. *Lowe*, *111 Fed., 1005; 49 C. C. A., 671.*

Tubular Rivet & Stud Co. vs. *O'Brien, 93 Fed., 200.*

Thomson-Houston El. Co. vs. Kelsey El. Railway Specialty Co., 75 Fed., 1005; 22 C. C. A., 1.

Brodrick Copygraph Co. vs. *Mayhew, 131 Fed., 92.*

National Phonograph Company, Ld., v. *Edison-Bell Cons. Phonograph Co., Ct. of App.; The Times, Dec. 19, 1907.*

Contributory infringement is "the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention."

El. R. Specialty Co. vs. *Kelsey El. Spec. Co., 72 Fed., 1016.*

This doctrine applies in the law of copyright.

Harper vs. Shoppell, 26 Fed., 521.

POINT V.

In selling articles not protected by patent or copyright, but manufactured by secret process, the vendor may impose limitations upon the use or future sale of the articles which may be enforced in equity.

In *Elliman* vs. *Carrington* (1901), *2 Ch., 275; 84 L. T. (N. S.), 858*, Mr. Justice Kekewich said:

"Carrington & Son are minded to buy Elliman's Embrocation with a view to selling it again, that is to say, to buy wholesale in order to sell to others retail, and Elliman, Sons

& Co. make a bargain with them that they shall not sell it below certain prices—that part of the bargain has not been broken and, that when they sell to others they will procure from those others an agreement that they will not sell it below certain prices. That part of the bargain has been broken.

Why should not Elliman, Sons & Co. be at liberty to fix the prices in that way? Nobody has argued, and it could not possibly be argued that they are not at liberty to fix the price on the first sale to Carrington & Son. Why should they not be at liberty to make the further baggain with Carrington & Son that they shall not sell it below a certain price? It is said that the contract is in restraint of trade. In one sense it is, but is just as much and no more in restraint of trade for Elliman, Sons & Co. to say that they will not sell at all. It seems to me, to say the least, that what is restraint of trade as regards Carrington & Son, is really the liberty of trade as regards Elliman, Sons & Co. * * * It is merely a question of whether a man is entitled when he is selling his own goods, to make a bargain as to the use to be made of them by the purchaser. * * * On the question, therefore, as to the validity of the contract I am entirely against the defendants."

This case was followed in *Board of Trade* vs. *Christie G. & S. Co.*, 198 U. S., 252.

In *Garst* vs. *Harris*, 177 Mass., 72 HOLMES, C. J., said:

"This is an action of contract to recover $21 as liquidated damages for breach of an agreement not to sell Phenyo-Caffein below a stipulated price. Phenyo-Caffein was a proprietary medicine purchased by the defendant of the plaintiff. At the time of the sale and as a part of it a written statement of terms, containing this agreement, was read to the defendant and delivered to him. * * * The rest of the defense needs but a few words.

It said that the contract was unlawful, as in restraint of trade. Some limits were

set to the inherent doctrine on this subject by the recent case of *Electric Co.* vs. *Hawkes, 171 Mass., 101,* as they had been in England before.

When, as here, there is a secret composition which the defendant presumably would have no chance to sell at a profit at all, but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough" (citing cases).

See also

Walsh vs. *Dwight, 40 App. Div., 513.*
Park & Sons Co. vs. *National Druggists Association, 175 N. Y., 1, 9, 10, 15, 17.*
Fowle vs. *Park, 131 U. S., 88, 97.*

In this case Mr. Chief Justice FULLER said:

"If the defendants violated the provisions of these contracts by selling the article within the territory which it was covenanted complainants should occupy exclusively or by selling to others for sale there, or by promoting such sales we are aware of no reason for the refusal of relief, unless it may be, as is contended, that the contracts were not enforceable on the ground of public policy. * * *

"Relating, as these contracts did, to a compound involving a secret in its preparation, based as they were upon a valuable consideration, and limited as to the space within which, although unlimited as to the time for which the restraint was to operate, we are unable to perceive how they could be regarded as so unreasonable as to justify the Court in refusing to enforce them."

See also

Board of Trade vs. *Christie Grain & Stock Co., 198 U. S., 236 250, 252.*
Whitwell vs. *Tobacco Co., 8th Circuit, 125 Fed., 454, 461, 462; 60 C. C. A., 290.*
In re Park, 138 Fed., 421.

The distinctions between these cases and those under the patent and copyright statutes are pointed out in

John D. Park & Sons Co. v. *Hartman*, *153 Fed., 24.*

POINT VI.

The rules above mentioned established as to patented articles apply also to cases of copyright.

If there be no publication, the owner of a manuscript retains his common-law rights no matter what communication of the manuscript is made to others.

If there be publication, the owner of a copyright may retain any portion of the statutory monopoly by restrictions upon the communication to others of the copyrighted article.

If the article be once effectually published so as to comply with the requirement of the statute in that regard, the owner of the copyright may thereafter make other copies and deal with them as he pleases, destroying them, distributing them, selling or leasing them upon any terms that please him. These terms the Courts will enforce:

Patents and copyrights are protected by the same constitutional provisions which empower Congress

> "To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors, the Exclusive Right to their respective Writings and Discoveries," Constitution Art. 7, Sec. 8.
>
> Congress has in Title LX of the Revised Statutes, protected these allied rights by similar statutes, which, in regard to the

point now at issue are expressed in almost the same words.

A patent gives the "exclusive right to make, use and vend the invention."

Sec. 4884.

A copyright gives the "sole liberty of printing, * * * publishing * * * and vending" the copyrighted article.

Sec. 4952.

The monopoly of making and vending the patented article and the monopoly of printing and vending the copyrighted article are given in equivalent language and by ordinary rules of interpretation should be equivalent.

It is only in the "field of use" that the monopolies differ. The patentee has the

> "exclusive right to * * * use * * * the invention."

The copyright owner has the

> "sole liberty of * * * publishing, completing, copying, executing, finishing * * * the book, map, chart, &c., and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their books for which copyright shall have been obtained under the laws of the United States."

R. S., Sec. 4952.

The patent law gives a complete monopoly and the copyright law a partial monopoly of the "field of use."

What is the reason for this distinction? It is because copyright is given only on condition that publication of the copyrighted book be made. Publication gives the public a right to make certain uses

of the book and the monopoly in the "field of use" conferred by the copyright can at most be what is left after the rights of the public gained by this publication are protected.

A patentee has an absolute monopoly in the field of use. So has the owner of an unpublished manuscript. Either may communicate the subject of the monopoly under any restrictions whatever and no rights inconsistent with such restrictions are surrendered.

But the owner of a copyright has a limited monopoly in the "field of use" and the

> "restrictions imposed after the publication cannot affect the public rights acquired by reason of the fact of publication."
>
> *Werckmeister* v. *Am. Lith. Co.*, 134 *Fed.*, 321.

Prior to publication

> "a person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals, or a limited ascertained class, or he may expressly or by implication confine the enjoyment of such subject to such occasion or definite purpose. A publication under such restrictions is a limited publication and no rights inconsistent with or adverse to such restrictions are surrendered.
>
> Restrictions imposed upon the use prior to publication protect the copyright. Such restrictions imposed after the publication cannot affect the public rights acquired by reason of the fact of publication. * * * The same distinctions are observed and the same rules applied in the cases where statutory copyright has been obtained."
>
> *Werckmeister* v. *Am. Lith. Co.*, 134 *Fed.*, 321.

The restrictions imposed after publication cannot affect the public rights acquired by reason of

the fact of publication. Otherwise "the same distinctions are observed and the same rules applied" to the limited statutory monopoly of copyright as to the unlimited common law monopoly in the unpublished manuscript.

The question arises, therefore, what are the public rights which are acquired by reason of the fact of publication of a book?

It has been said, and although doubtful, it may here be assumed that the fact of publication requires that copies of the book shall be offered freely for sale to the public. (*MacGillivray, 260.*) The purchase of one of these copies gives to the purchaser the unrestricted ownership of that copy with all the incidents of ownership—the unlimited right to read it, to sell it, to bind and rebind it (*Kipling* vs. *Putnam, 120 Fed., 631*), and also a right to make use of its contents for purposes of criticism, quotation and the preparation of other books; this latter right not being unlimited, but restricted and defined by the decisions of the Courts concerning the "fair use" of copyrighted books. No one has claimed that the fact of publication gives other rights to the public than the right to acquire and own copies of the book and the right to make "fair use" of its contents.

For instance, the public has no right to demand that all copies shall be sold freely to the public, or to fix the price at which copies of the book shall be sold, or to demand single copies at wholesale rates or to prohibit the owner of the copyright from selling copies to jobbers or others at wholesale rates upon special and beneficial conditions as to use and future sale.

It follows, therefore, that the restrictions imposed upon jobbers by Charles Scribner's Sons are not restrictions which affect the public rights acquired by reason of the fact of publication, and, this being so, the plaintiffs may proceed to enforce

the conditions annexed to their sales to the jobbers since the plaintiffs have surrendered no rights inconsistent with these conditions. It is shown that the defendants have freely bought the books mentioned in the complaint in such quantities as they pleased at the same retail prices at which the books are offered to the public. The copies so bought passed out of the plaintiffs' monopoly and became the absolute and unrestricted property of the defendants. No one disputes their right to deal with these copies. It is apparent, therefore, that all public rights in the books have been provided for and the present controversy relates to rights which the plaintiffs have reserved and which, under the rules laid down in *Werckmeister* vs. *American Lithographic Co., supra*, the plaintiffs could lawfully reserve and enforce.

POINT VII.

The copyright cases show that in the three fields of making, use and sale, the law closely agrees with the law of patents.

The language of Judge BAKER in *Victor Talking Machine* vs. *The Fair* applies to a case of copyright.

"By its terms the grant covers three separate or separable fields. The owner of (copyright) may agree with one that he will not exclude him from making, with another from using and with yet another from selling" his copyrighted books.

Drone on Copyright, 334.
Macgillivray on Copyright, 274.

(*a*) *"The Field of Making."*

The monopoly of this field is granted in patent law as an "exclusive right to make" * * * "the invention or discovery" (*U. S. R. S., Sec. 4884*). In copyright law it is

> "the sole liberty of printing, reprinting, publishing, completing" * * * "the book, map, chart, dramatic or musical composition, engraving, cut, print," &c.
>
> *R. S., Sec. 4952.*

The owner of the copyright may agree with different people to print different editions of his book. He may publish it simultaneously or successively, in newspapers in different parts of the country, in magazines in serial form, in book form, in cheap and dear editions. His licenses to print may be given to different licensees and divided as to time or as to place.

> *Harper & Bros.* v. *M. A. Donohue & Co., 144 Fed., 491, 492.*
>
> *Drone, 334, 341, 343, 363.*
>
> *Macgillivray, 274.*
>
> *Black* vs. *N. G. Allen Co., 42 Fed., 618, 621.*

In the language of Judge BAKER in *Victor Talking Machine* vs. *The Fair*, the control of this field by the owner of the copyright is complete. He may subdivide it as he pleases and offer to sell or lease in the most fanciful parcels on the harshest terms. * * * If purchasers or tenants do come the courts will enforce the terms of the sale or lease. And how could it be otherwise, owning the whole he owns every part.

(*b*) *"The Field of Use."*

In patent law the monopoly is the "exclusive right to * * * use * * * the invention" (*R. S., Sec. 4884*).

In copyright law, it is

> "the sole liberty of * * * publishing, completing, copying, executing, finishing * * * the book, map, chart, &c., and in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their books for which copyright shall have been obtained under the laws of the United States."
>
> *R. S., Sec. 4952.*

Most copyright litigations relate to the field of use.

> "In the law of copyright, piracy is the use of literary property in violation of the legal rights of the owner. The meaning of infringement is the same."
>
> *Drone, 383.*

Certain uses of the copyrighted book by the public are held to be lawful. All other use is within the exclusive control of the owner of the copyright.

The line between "fair" and "unfair" use—the use permitted by the act of publication and the use reserved in spite of publication has been drawn in many cases in connection with different subjects, such as Criticism, Quotation, History, Biography, Abridgments, Translation, Dramatization, Treatises, Directories, Dictionaries, Catalogues.

Drone, 387-399, 433, 467.

The cases show that, leaving out of sight what is known as "fair use," all the rest of the "field of use" belongs absolutely to the owner of the copyright. He may divide it as he pleases, and license anyone to enter it. Such license is always a defense (Drone, 499). When the field of use is in-

vaded without license, the copyright law will prevent or punish the trespass.

Copyright law in this respect closely agrees with the patent law. "The same rule should be applied to a copyright as to a patent for a machine."

McLEAN, *J.*, *Story* vs. *Holcombe*, *4 McLean, 306.*

The methods of dividing the field of use are familiar. Sometimes playright and copyright are separated (Drone, 62). Sometimes the right to use a dramatic composition is assigned to different people in different places for different periods, and this either by license or by partial assignments (Drone, 623). So, it is a familiar fact that the right to translate a book may be divided among different translators, each to use a designated language, and that licenses may be given to people to enter the field of use of copyright books for the purpose of making other treatises or of criticism or of publication in magazines, licenses being given to use certain passages or certain illustrations for specified purposes.

Whenever anyone enters upon a portion of the field of use which has not been thrown open to him he is a trespasser, who can be prosecuted under the law of copyright. Numerous authorities illustrate these propositions.

Macgillivray on Copyright, 281, 282;
Callaghan vs. *Meyers, 128 U. S., 617;*
West Pub. Co. vs. *Lawyers' Co-Op. Pub. Co., 79 Fed., 756; 25 C. C. A., 648;*
Reed vs. *Holliday, 19 Fed., 325;*
List Pub. Co. vs. *Keller, 30 Fed., 772;*
Gilmore vs. *Anderson, 38 Fed., 846;*
Harper & Bro. vs. *Donohue, 144 Fed., 491, 492;*

West Pub. Co. vs. *Lawyers' Co-Op. Pub. Co., 64 Fed., 360;*
Falk vs. *Brett Lith. Co., 48 Fed., 678;*
Social Reg. Assn. vs. *Murphy, 128 Fed., 116;*
Enc. Brit. Co. vs. *Am. Newspaper Assn., 130 Fed., 460;*
Harper vs. *Ranous, 67 Fed., 904;*
Guggenheim vs. *Leng & Co., Q. B. Div., 1896, 12 T. L. R., 491;*
Roberts vs. *Myers, 13 Monthly Law Rep., 396, 401;*
Nicholas vs. *Parker, 17 T. L. R., 482;*
Daly vs. *Palmer, 6 Blatchf., 256;*
Daly vs. *Webster, 56 Fed., 483;*
Note to Press Pub. Co. vs. *Monroe, 51 L. R. A., 353;*
Dr. Miles Med. Co. vs. *Jayne Drug Co., 149 Fed., 858;*
Rubber Tire Wheel Co. vs. *Milwaukee Rubber Works Co., 142 Fed., 531, 536.*

These cases show that the owner of a copyright may farm out such a part of the field of use as he pleases, and retain the balance, and whoever without permission enters the reserved portion is an infringer.

(*c*) "*The Field of Sale.*"

In patents "the exclusive right to vend."

In copyrights "the sole liberty of * * * vending."

The owner of the copyright may make a valid contract as to the selling price of the copyrighted article;

Drone, 365;

and such an agreement is binding upon assignees of his rights who take with notice.

Murphy vs. *Christian Press Assn.*, *38 App. Div.*, *426.*

In *Clemens* vs. *Estes*, *22 Fed.*, *899*, Clemens, by his general agents, sold books to canvassing agents who bound themselves by contract to sell only to subscribers and not to the trade, and for the full retail price.

The defendants had no knowledge of the contract between the plaintiff, or his publishers, and their canvassing agents. An injunction was denied by Judge COLT on the ground that the defendants were ignorant of the contract between the plaintiff and his agents, and because there was no evidence going to show that the defendants tried to induce the agents to sell the books or to break any contract.

Had the proof in these particulars been like that in the case at bar, the learned judge would apparently have granted the injunction.

The position of the jobbers in the case at bar closely resembles that of the canvassers in *Clemens* vs. *Estes*, and so far as it goes the case is in our favor.

Mutatis mutandis the remarks of Judge CULLEN in *Murphy* vs. *Christian Press Assn. Pub. Co.* (*38 App. Div.*, *429*) apply:

> "The agreement on the part of the defendant's predecessor in title, though technically a personal one, related to the use of the property, the copyrights and the plates, and obligated all who might acquire that property with notice of the agreement. This is the settled doctrine of the Court of Appeals when the agreement relates to real estate (*Hodge* vs. *Sloan*, *107 N. Y.*, *244*; *Lewis* vs. *Gollner*, *129 id.*, *227*). We can see no reason why the same rules should not apply to personal property, nor are we wanting in authority to

sustain the proposition (*N. Y. Bank Note Co.* vs. *Hamilton Bank Note Co., 83 Hun, 593; 28 App. Div., 411; Littlefield* vs. *Perry, 88 U. S., 205*)."

It is to be noted that the agreement sustained in *Murphy* vs. *Christian Press Publishing Co.* related to the cutting of retail and wholesale price and the case is much in point.

Strong support of our contention is found in the history of the law as to the rights of translation and dramatization. Formerly these rights were not absolute but permissive. The owner of copyright *might reserve* these rights. They were lost by unrestricted sale of the copyrighted books, *but a sale restricted by notice of claim* preserved the right of translation and dramatization. Why should such a sale not equally preserve a portion of the privilege of vending?

Drone, 445, 449.

It was said by Judge CLIFFORD in *Parton* vs. *Prang (3 Cliff., 537)*:

> "Personal property is transferable by sale and delivery, and there is no distinction in that respect independent of statute, between literary property and property of any other description (*Palmer* vs. *De Witt, 47 N. Y., 532*). * * * Sales may be absolute or conditional, and they may be with or without qualifications, limitations and restrictions, and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property."

And see

Littlefield vs. *Perry, 21 Wall., 205;*
Hudson vs. *Patten, 1 Root (Conn.), 133;*
Black vs. *H. G. Allen Co., 56 Fed., 764, 768;*
Aronson* vs. *Baker, 43 N. J. Eq., 369;

Cooper vs. *Stephens* (*1895*), *1 Ch., 567;*

and as to contributory infringement,

Harper vs. *Shoppell, 26 Fed., 520.*
Authors and Newspapers Ass'n v. *O'Gorman Co., 147 Fed., 616.*

As to the matter now under consideration, namely, the rights of the purchaser of copies sold by the publisher, the Court of Appeals in the Seventh Circuit said:

> "The question (of rebinding a copyright book) is analogous to the repair of a patented machine which has been sold by the patentee."
>
> *Doan* vs. *Am. Book Co., 105 Fed., 776.*

So, as to the very contract and rules involved in the case at bar, the New York Court of Appeals has held in a litigation between the parties now before the Court and others. After referring to *Bement* vs. *National Harrow Co.* (*186 U. S., 70*), cited above, Chief Judge PARKER, speaking for the Court, said:

> "That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action."
>
> *Straus* vs. *Am. Pub. Assn., 177 N. Y., 447.*
>
> *Opinion of* GRAY, *J., p. 489.*

Why should a manufacturer of phonographs, benzo-purpurine, phenacetine, neostyles or button fasteners be allowed to use all the channels of trade for his merchandise, still keeping reserved portions of his monopoly in regard to these articles under the potent protection of the court, while a publisher is told that the moment he parts with the legal title to a book, no matter with what restric-

tions or upon what conditions, it has passed forever out of the protection of the copyright statute?

It is absurd to say that the monopoly of vending a copyrighted book is gone when the book passes into the hands of a jobber, no matter with what restrictions, while the monopoly of vending a patented book may be exercised through all the instrumentalities of modern trade.

There is no reason for making a copyright a retail monopoly protecting the owner only when he sells directly to the consumer, while the patent is also a wholesale monopoly available through all the channels by which alone trade can be profitably conducted.

See also

> *Park & Sons Co.* v. *National Wholesale Druggists' Association*, 175 N. Y., 1.

This case, with *Straus* v. *American Publishers' Association*, 177 N. Y., 473, are discussed in *John D. Park & Sons* v. *Hartmann*, 153 Fed., 24, 35, 36. In this case, Judge LURTON, speaking for the Circuit Court of Appeals, says:

> "There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes that the cases which relate to the one statute are not altogether controlling as to the other. *See Bobbs-Merrill Co.* v. *Straus* (C. C. A.), 147 Fed., 15, 23.
>
> *Nevertheless the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made outside of the rule as to restraints of trade which might otherwise apply. Murphy* v. *Christian Press Ass'n, 38 App. Div., 426.*"

It is respectfully submitted that the italicized words are a disapproval of the rule in the *Bobbs-Merrill* case, at least so far as this rule applies to the case at bar.

> "The exemption from the common law rule against monopoly and restraint of trade, and the provisions of the federal Anti-trust Act of July 2, 1890, which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent, *or productions covered by a copyright*, does not extend also to articles made under a secret process," etc.
>
> *Park & Sons Co.* v. *Hartmann (C. C. A.), 153 Fed., 24.*

Cooper vs. *Stephens (supra)* has been approved by the Court of Appeal in

> *Marshall & Co., Ltd.*, vs. *A. H. Bull, Ltd., 85 Law Times Reports, 77, 82.*

In that case plaintiffs published a book with twelve designs for making furs and garments. E. and W. obtained permission to use these designs and bought the blocks or stereos from the plaintiffs. P. & Co. printed a catalogue for E. and W. containing the designs and bought the stereos from them without any conditions or restrictions. P. & Co. used the stereos to publish a catalogue for B. & Co., and the plaintiffs obtained an injunction against P. & Co. The judgment was affirmed. Lord Justice ROMER said:

> "The sale of the stereos in themselves to the person from whom the defendant obtaine them, with liberty to these persons to print and publish for a particular purpose, would clearly not deprive the plaintiffs of their original copyright in the work as against the world, nor could the defendants as purchasers of the stereos from the original purchasers from the plaintiffs get any better right to print and publish copies from these

> stereos than the persons from whom they bought them. The argument that the stereos in themselves conveyed a right to the defendants, or that by reason of the nature of these stereos the plaintiffs are in any way estopped as against the defendants from insisting on their copyright, appears to me unfounded. You cannot gather, as it appears to me, from the fact of the sale of the stereos in this case any representation that the holders of the stereos for the time being should have the right of printing and publishing copies from those stereos so as to be able to give them exemption from the operation of the copyright acts. * * *"

Judge LACOMBE so held in a case where the plates were sold on execution.

Patterson vs. *Ogilvie*, 119 Fed., 453.

And so it was decided in

Stevens vs. *Gladding*, 17 How., 447.

But in the English case a right to publish was sold with the plates by the owners of the copyright.

It is difficult to distinguish this case in principle from the case at bar.

In the case at bar the question corresponding to that asked by ROMER, *L. J.*, would be this:

> Can you gather from the fact of a restricted sale of books any representation that the holders of them for the time being should have the right of selling the books without regard to the restriction, so as to give them exemption from the operation of the copyright acts?

We submit that the answer to this question must be in the negative and is involved in the language of Mr. Justice CURTIS, in *Stevens* vs. *Gladding* (17 *How.*, 447):

> "What rights would pass by such a sale would depend on the intention of parties, to

be gathered from their contract and its attendant circumstances."

The owner of a copyright may sell with any conditions and limitations that he pleases the blocks used to produce the copyright article and the copyright law will protect him in so much of the field of production or use as he has reserved to himself. The mere transfer of title is not conclusive. In patent law this principle once established was extended to the "field of sale" and permits the patentee to control retail prices.

Victor Talking Machine vs. *The Fair.*
National Phonograph Co. vs. *Schlegel.*
supra.

There is no reason why the same rule should not apply in copyright law.

If a man may sell stereos and give authority to produce the copyrighted article at certain prices (as in *Murphy* vs. *Christian Press Association*), or for certain purposes (as in *Cooper* vs. *Stephens* and *Marshall & Co., Ltd.*, vs. *Bull & Co., Ltd.*), and yet reserve portions of his monopoly, why may he not also sell the copyrighted article itself on conditions as to the price at which it may be resold or the uses to which it may be put by the vendee? If he does so, and the vendee assents to the conditions, why are not the vendee's rights and the rights of those claiming under him, with notice, limited by the conditions?

If the owner of the copyright and the vendee of the copyright article agree that the vendee shall have only limited rights therein, how can he be said to obtain unlimited rights by the transaction?

If the vendor, with the consent of the vendee, expressly reserves a portion of his monopoly in the thing sold, how can the vendee invade the reserved portion of the monopoly which he has ex-

pressly agreed to respect? And how (except on some principle of estoppel) can the vendee authorize another to do what he cannot himself do?

POINT VIII.

It is respectfully submitted that the opinion of the Circuit Court of Appeals is not sustained by authority.

The learned judge in his opinion (*147 Fed., 20*) cited three cases,

Bill Publishing Co. v. *Smythe* (*C. C.*), *27 Fed., 914.*

Harrison vs. *Maynard, Merrill & Co., 10 C. C. A., 17; 61 Fed., 689.*

and

Bobbs-Merrill Co. v. *Snellenburg* (*C. C.*), *131 Fed., 530.*

An examination of these cases will show that they do not sustain the rule laid down by the court. (*a*) *Bill Publishing Co.* vs. *Smyth, 27 Fed., 914*, is also cited by Judge RAY and by Judge HOLLAND in *Bobbs-Merrill Co.* vs. *Snellenburg.*

This case was decided in 1886. The complainants sold books only by subscription. The defendants surreptitiously obtained copies from the publishers' agent. The court enjoined him from selling them. The decision is an authority in our favor. The learned judge, however, stating his unfamiliarity with the law of copyright, went on to speculate about it, the speculation and discussion being ob-

viously unnecessary to the decision of the question before him.

There are in the opinion *dicta*, plainly *obiter* and supported by no authority, which are opposed to our contention here. In view of the line of recent well-considered decisions cited in Points III, IV, V, VI and VII, it is submitted that Judge HAMMOND'S *dicta* should have little weight.

The decision is highly technical. It is decided by the Court in the *Bill Company* case, and was decided by the learned Trial Judge in the case at bar, that the owner of a copyright may employ agents to sell his books by subscription only and may thus control under the copyright law the method of sale and the price of his books. If, however, he attempts to accomplish the same result through the same agents in precisely the same way, except that title to the books is vested in the agents, the transaction is said to pass out of the protection of the copyright statute. Why should this doctrine be asserted? There is, as we have seen, nothing like it in patent law. Mere questions of title are important in the law of sales, attachment, execution, insurance and the like, but (except so far as they relate to the acquisition of the monopoly itself), they have never been considered essential in the law of literary property, which usually considers the substance and effect rather than the form of transactions.

For example, the publication which is necessary to copyright and which, in the absence of copyright, destroys literary property, is a question of substance and intention, not of form.

Sometimes the giving or sale of the original or of a replica or of copies is not a publication; sometimes the mere renting of copies is a publication.

Where there is a restricted publication no rights inconsistent with the restriction are surrendered. There may be a sale of the subject of copyright

separate and distinct from the sale of the copyright therein.

Werckmeister vs. *Am. Lith. Co.*, *134 Fed.*, *321.*

Press Publishing Co. vs. *Monroe*, *19 C. C. A.*, *429*; *73 Fed.*, *196.*

The Jewelers' Mercantile Agency vs. *The Jewelers' Weekly Pub. Co.*, *155 N. Y.*, *241.*

Werckmeister vs. *Springer Lith. Co.*, *63 Fed.*, *808.*

Caid vs. *Syme*, *12 App. Cas.*, *326*, *344.*

Bartlette vs. *Crittenden*, *4 McLean*, *300*; *Fed. Cas. No. 1076.*

Prince Albert vs. *Strange*, *2 De G.*, *652.*

Ladd vs. *Oxnard*, *75 Fed.*, *729.*

Queensberry vs. *Shebbeare*, *2 Eden.*, *329.*

Ex. Tel. Co. vs. *Gregory*, *1896*: *1 Q. B.*, *147.*

Kiernan vs. *Manhattan Quotation Co.*, *50 How. Pr.*, *194.*

Aronson vs. *Baker*, *43 N. J. Eq.*, *365*, *369*, *370.*

Cooper vs. *Stephens*, *1895*, *1 Ch.*, *567.*

Blunt vs. *Patten*, *2 Paine*, *393*; *Fed. Cas.*, *1579.*

French vs. *Kieling*, *63 Fed.*, *621.*

Drummond vs. *Altemus*, *60 Fed.*, *338.*

N. Y. State Dental Soc. vs. *Dentacura Co.*, *57 N. J. Eq.*, *693.*

Tuck vs. *Priester*, *L. R.*, *19 Q. B. Div.*, *629.*

All this applies literally to *The Henry Bill Publishing Co.* case and not less to the case at bar, for

the defendants' contention, sustained below, is that the right to vend passes as an incident of the sale of the copies, notwithstanding the express reservation of it by the publisher at the time of the restricted sale and the express assent of the jobbers to the restriction and their agreement that the sale shall be made only upon condition.

(*b*) In *Harrison* vs. *Maynard, Merrill & Co., 61 Federal, 689; 10 C. C. A., 17*, a decision by the Court of Appeals, in the Second Circuit, copyrighted sheets had been sent by the plaintiffs, who were publishers, to Alexander, a binder. In his shop the sheets were partially destroyed by fire. Alexander, with complainants' consent, sold them to one Fitzgerald, with other debris. Fitzgerald resold them to Italian dealers in waste paper, who agreed that they should be sold as paper stock only. Some one bound the books and resold them to the defendants, who had no knowledge of any restriction.

The injunction was set aside. The Court notes that

> "the complainant, which was the owner of the copyright, permitted Alexander to sell *absolutely* all its copyrighted books in his cellar, and that his vendee obtained the entire legal title to these damaged volumes."

The restrictions were imposed *not by the owner of the copyright but by the vendee of the books, and even of these restrictions the defendant was ignorant.*

Clearly, the result of this case would have been the same under the rules for which we contend.

Nor is the opinion inconsistent with our contention.

The learned judge contrasts the rights of a publisher who has retained the title to his book to protect it under the copyright law with the rights

of the owner of a copyright *"who has parted with all his title to* (a book), *and has conferred an absolute title* to the copy upon a purchaser, though with an agreement for a restricted use" (61 Fed., 691).

"The copy having been absolutely sold to him," the purchaser may treat it as his own. The court discussed the effect of an agreement for restricted use contemporaneous with the sale; *but the case of a conditional or restricted sale was not before the court, and was not considered in the opinion.*

So far as it goes, the case of Harrison *vs.* Maynard, Merrill & Co. defines copyright monopoly precisely as the patent monopoly has been defined. By an unrestricted sale a patented article passes out of the protection of the Patent Law.

Robinson on Patents, Secs. 824, 826;
Holliday vs. *Mattheson, 24 Fed., 185,*

but such effect would not follow an unrestricted sale by an agent who had no right to make it to a purchaser who knew of the limit to the agent's powers. This follows from the general law of agency and needs no citation of authority.

Harrison vs. *Maynard, Merrill & Co.* shows that the monopoly of a copyright and the monopoly of a patent have like effect in the case of an absolute sale of the articles protected by them and also in the case where the owner of the monopoly retains the legal title to the article.

Why, if the monopolies resemble each other in these cases, should they differ from each other in the case of a *conditional sale?*

So, in *Chaffee* vs. *Boston Belting Co.* (*22 How., 217*), this Court said in the strongest way that a sale of a patented article freed it from the monopoly. But the idea of a restricted or conditional sale was not before the court, and this has not hindered

the courts from holding other views as to restricted or conditional sales in patent cases.

It may be said that the particular facts of the case at bar bring it within the remarks of Judge SHIPMAN in *Harrison* vs. *Maynard* (61 Fed., 690), because under the agreement at bar the jobber had in effect put himself in the position of a mere agent selling books, the title to which the publishers had the right to resume (Rule VII, p. 53).

In effect, the jobbers made themselves agents of the publishers to protect the reserved portion of the monopoly, and the title of the books was transferred to them with this limitation. These agents cannot transfer an unrestricted title, nor can they (except on some principle of estoppel) give the defendants a license to deal with the books, which they themselves do not possess. But we prefer to take the broader ground that the decision in *Harrison* vs. *Maynard, Merrill & Co.* rests upon the same principles as the rules in patent cases on which we rely, and that we may confidently ask for the analogous application of those principles to the case of a conditional or restricted sale, which was not in the mind of Judge SHIPMAN, but has been fully considered in the patent cases. An unrestricted license to use and vend flows only from an unrestricted sale of a book, as of a patented article. A restricted sale gives a restricted license. A sale on condition that a book be not sold to the consumer for less than $1.08, gives no license to any one aware of the condition to sell to the consumer at 98 cents.

(*c*) The *Bobbs-Merrill* litigations.

After the commencement of the suit at bar, the Bobbs-Merrill Company began two actions for similar relief. The dates of the proceedings in these

suits and in the case at bar are interesting and are appended in parallel columns.

Scribner *vs.* Straus

1903
Nov. 10 Subpœna filed.
Nov. 25 Injunction refused.

1904.
Feb. 23 Answer filed.
March 22 Exceptions to Answer.
April 28 Exceptions sustained.
July 28 Replication.

1904.
June—Bobbs-Merrill Co. *vs.* Snellenburg begun.
July 14 Bobbs-Merrill Co. *vs.* Straus begun.
Aug. 1 Injunction denied.
Aug. 3 Answer sworn.

(*c*) In *Bobbs-Merrill Co.* vs. *Snellenburg, 131 Fed., 530*, Judge HOLLAND in the Circuit Court, Eastern District of Pennsylvania, denied a motion for a preliminary injunction.

The case is distinguishable from the case at bar:

1, on the facts;

2, because the rule in patent law seems not to have been presented to the Court;

3, because the authorities cited fall short of establishing the rule contended for by the defendants here.

1. There is an essential distinction on the facts because the defendant Snellenburg had no information that the plaintiffs were attempting to limit the retail price of the books, other than a notice

contained in the books themselves (*131 Fed., 530*), which was as follows:

> "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright. The Bobbs-Merrill Company."

This notice was, in itself, as the court pointed out, of a broad and general character, unlimited in time, and apparently relating equally to all sales. No evidence was given of any agreement between the publishers and the jobbers, of any conditional sale to the jobbers, or of any acquiescence by the jobber in the limitations, such as they are, of the notice. The notice itself made no distinction between wholesale and retail sales, and apparently it related, as the court pointed out, even to sales of second-hand copies. The notice itself does not make the original sale by the publisher to the jobber a restricted or conditional sale; it does not prohibit the wholesale dealer from anything except from selling at less than retail price.

It might be difficult to interpret a notice which, taken literally, called upon each dealer to sell for the same price at which he bought.

The case, therefore, lacks many of the essential elements of the case at bar.

Charles Scribner's Sons undertook a simple thing, namely, that the retail price of their copyright books should be kept up for one year. Both the agreement with jobbers and the notice on the billheads were plain and intelligible and easy to comply with. The notice was like the notices in *Dickerson* vs. *Matheson* and *Dickerson* vs. *Timling, supra.* The sales to jobbers were made only upon condition of the maintenance in retail sales of this retail price. In that condition the jobbers acquiesced, and by it they agreed to be bound, and they also agreed not to sell

to any retailer known to be a price-cutter. The defendants, who were notorious price-cutters, with full knowledge of the conditional sale and of the jobbers' agreement, obtained the books from the jobbers surreptitiously, in violation of the jobbers' contract, and sold them at retail within the year for less than the price fixed.

The very foundations of our claim were lacking in the *Bobbs-Merrill* case.

2. But, so far as appears from the opinion, the attention of the Court was not drawn to the decisions in patent cases which declare the rights of the holder of a monopoly to reserve portions of the monopoly upon conditional sales of an article affected by the monopoly. Nor did the Court consider the application of the rule of contributory infringement. Indeed, this rule was inapplicable, since no contract limiting the jobbers' rights was shown to exist between publisher and jobber.

Judge HOLLAND based his decision entirely upon two cases decided before the rules relied upon by complainants had been extended even in patent cases to what, in the case of the *Victor Talking Machine Company* vs. *The Fair* (*supra*), is called "the field of sale," and while yet these rules were novel even in "the field of use."

(*d*) *Bobbs-Merrill Co.* vs. *Straus*, *139 Fed.*, *155*.

The case depends upon the same facts as *Bobbs-Merrill* vs. *Snellenburg* and the distinctions just enumerated in regard to that case apply equally to the case against Straus.

There is a further distinction.

The learned Judge who presided at the trial put his decision partly on the ground that the American Publishers' Association is an illegal monopoly.

139 Fed., *158-178*, *189-193*.

A similar defense was set up in the suit at bar (Record, pp. 133-139) and was stricken out as impertinent (140, 141). If the defence was impertinent in a suit brought by Mr. Scribner, one of the officers of the Association, it would probably have been held impertinent as to the Bobbs-Merrill Co. —a member of the association, indeed, but so far as appears, having no part in its management and not being a party to its litigation. The Bobbs-Merrill Company, however, did not except to this impertinent defense but on the contrary stipulated that the allegations of the answer were true.

The New York Court of Appeals, in a hard-fought action brought against the American Publishers' Association, decided that it was not an unlawful combination. Judge RAY has decided the contrary in a suit to which the association was not a party, was not represented by counsel and was not even defended by any volunteer or *amicus curiæ*.

The learned Judge noted the rule that it is no defense to a suit for a breach of copyright that the complainant is violating the Sherman Anti-Trust Law, but he found that the Bobbs-Merrill Company was excepted from the benefit of the rule because it had "turned over to the combination the fixing of prices" (139 Fed., 190). It was shown in the case of Straus *vs.* American Publishers' Association that the members of the association did not turn over to the association the fixing of prices, but, on the contrary, each publisher fixed the prices of the books published by him.

Straus vs. *Am. Pub. Assn.*, *85 App. Div.*, *446*, *454*, *460*; *177 N. Y.*, *473*, *477*, *488*.

Judge RAY did not consider this difference important. He says, "By this agreement the members thereof are to cut off all supply of their copyrighted books to any dealer who fails to maintain

the net price of such books as fixed by such association or *what is the same thing, by its members*" (*139 Fed., 189*).

It has been hitherto held that, in regard to fixing prices, the essential difference between lawful and unlawful combinations is whether the combination fixes the price to be charged by all its members, or each member fixes the price which he will charge for his own goods.

Park vs. *Nat. Druggists' Assn.*, *175 N. Y., 1, 15.*

The learned Judge would probably not have ignored this distinction if he had heard both sides of the question argued.

For the purpose of this argument it is enough to say that the case at bar is distinguished from Bobbs-Merrill *vs.* Straus, because it is the law of this case that the attempted defence based on the alleged illegality of the American Publishers Association is impertinent.

POINT VIII.

The decrees of the Circuit Court of Appeals and of the Circuit Court appealed from should be reversed, with costs. On account of the lapse of time no injunction can now be ordered, but the complainants are entitled to an accounting of the profits made by the defendants.

STEPHEN H. OLIN,
Of Counsel for
Complainants-Appellants.

STEPHEN H. OLIN,
Solicitor.

IN THE

United States Supreme Court.

CHARLES SCRIBNER'S SONS, Incorporated,
Complainant-Appellant,

AGAINST

ISIDOR STRAUS and another,
Defendants-Respondents.

No. 205.

BRIEF FOR APPELLANT.

Statement.

By the rules of American Publishers' Association the retail price of each book was to be maintained for one year (Record, pp. 3, 35). As to the books mentioned in the bill of complaint in suit No. 1, the year expired before the final hearing and the complainants were not then entitled to an injunction. For this reason suit No. 2 was commenced.

The bill of complaint states that on the following dates the complainant copyrighted the following books and fixed for them the following prices:

1. "Bred in the Bone."
   May 19, 1904, lowest price $1.08.
2. "Christmas Eve on Lonesome and Other Stories."
   September 30, 1904, lowest price $1.08.
3. "A Parody Anthology."
   September 30, 1904, net price $1.25.

Annexed to the bill of complaint are the rules of the American Publishers' Association as amended to April 1, 1904. It is alleged that the complainant is a New Jersey corporation, and the successors to the firm of Charles Scribner's Sons. Otherwise the allegations of the bill correspond to those in suit No. 1.

By the answer and the stipulation as to evidence (p. 12) the facts are shown to be similar to those admitted, stipulated or proved in suit No. 1, and the same questions of law were presented in both suits. The cases were tried together and judgment of dismissal entered in both. The complainant appealed to the Circuit Court of Appeals. The judgment was there affirmed and the complainant appealed to this Court.

Point.

For the reasons set forth in the appellant's brief in suit No. 204 the complainant was entitled to a decree granting an injunction as prayed for in the bill, directing a reference to a commissioner to ascertain the complainant's damages and awarding costs to the complainant; and the dismissal of the bill of complaint was error. The Circuit Court of Appeals erred in not reversing the judgment and granting the relief prayed for except the injunction. A decree to this effect should now be entered.

STEPHEN H. OLIN,
Of Counsel for Complainant-Appellant.

OLIN, CLARK & PHELPS,
Solicitors.

IN THE

Supreme Court of the United States.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER, trading as CHARLES SCRIBNER'S SONS,

Appellants,

AGAINST

ISIDOR STRAUS and NATHAN STRAUS, individually and as copartners trading under the firm of R. H. MACY & COMPANY.

No. 204.

CHARLES SCRIBNER'S SONS, Incorporated,

Appellant,

AGAINST

ISIDOR STRAUS and NATHAN STRAUS, individually and as copartners trading under the name of R. H. MACY & COMPANY.

No. 205.

MOTION BY APPELLANTS TO TAKE UP THESE CASES OUT OF THEIR ORDER AND SET THEM DOWN TO BE HEARD WITH NO. 176, THE BOBBS-MERRILL COMPANY v. ISIDOR STRAUS AND NATHAN STRAUS.

The special and peculiar circumstances for this application are these:

The cases of "Scribner *v.* Straus" and of "Bobbs-Merrill Company *v.* Straus" involve the same questions of copyright law.

The case of Scribner *v.* Straus was begun in the Circuit Court of the United States for the Southern District of New York on November 10, 1903. The answer was filed on February 23, 1904. Exceptions to the answer were sustained on April 28, 1904.

In June, 1904, the Bobbs-Merrill Company began an action against one Snellenburg, in which the injunction was denied. On July 14, 1904, the Bobbs-Merrill Company began an action against the defendant Straus in the Circuit Court for the Second Circuit.

All the matters stricken out in the answer in the Scribner case were again pleaded in the Bobbs-Merrill case, and their truth admitted by stipulation, thus bringing before the Court the matter which in the Scribner case had been stricken out as irrelevant.

The Bobbs-Merrill Company *v.* Straus and Scribner *v.* Straus came on for trial before District Judge Ray, and were decided on July 11, 1905.

Bobbs-Merrill Co. *v.* Straus, 139 Fed., 155.

Scribner *v.* Straus, 139 Fed., 193.

The cases were heard together at the Circuit Court of Appeals and reported together.

The Bobbs-Merrill Co. *v.* Straus, 147 Fed., 15.

Scribner *v.* Straus, 147 Fed., 28.

It would be a serious detriment to the appellants above named if the case of Bobbs-Merrill Co. *v.* Straus were decided before the appeal of these appellants can be heard. There is, however, no community of interest between The Bobbs-Merrill Company and the above named appellants which

would permit these appellants to make any stipulation bringing this appeal within the provisions of Rule 26, Subdivision 8.

These appellants respectfully ask that these cases may be advanced and heard with No. 176.

Respectfully submitted,

STEPHEN H. OLIN,
Counsel for Appellants.

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JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER trading as CHARLES SCRIBNER'S SONS,

Appellants.

against

ISIDOR STRAUS and NATHAN STRAUS, individually and as co-partners trading under the name of R. H. MACY & CO.,

Appellees.

No. 204.

OCTOBER TERM, 1907.

APPEAL FROM DECREE OF THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT.

BRIEF FOR APPELLEES.

J. G. CARLISLE,
EDMOND E. WISE,
Of Counsel.

B. H. TIERNEL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States.

CHARLES SCRIBNER & ARTHUR H. SCRIBNER, *trading as* CHARLES SCRIBNER'S SONS,
Appellants,

against

ISADOR STRAUS and NATHAN STRAUS, *trading as* R. H. MACY & Co.,
Appellees.

NUMBER 204.

October Term, 1907.

APPEAL FROM DECREE OF THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT.

Brief for Appellees.

This is an appeal from a decree of the Circuit Court of Appeals of the Second Circuit affirming the decree of the Circuit Judge dismissing the Bill of Complaint after a hearing upon the merits.

The appellants, under the firm name of Charles

Scribner & Sons, are publishers of books, selling their own publications both at wholesale and retail, and selling the publications of other houses at retail.

The appellees are partners under the firm name of R. H. Macy & Co. and are carrying on a department store, wherein they sell at retail only, books, copyrighted and uncopyrighted.

About the year 1901, the publishers constituting a majority of the publishing trade (X-Q. 38, page 55), planned to "correct some of the evils con-"nected with the cutting of prices on copyrighted "books" (Ex. 2, page 84), and among other things they agreed:

> "III.—That the members of the Association agree that such net copyrighted books and all others of their books, shall be sold by them to those booksellers only, who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the Association as one who cut such prices, or who fails to abide by such fair and reasonable rules and regulations, as may be established by local associations as hereinafter provided.
>
> "A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale."

The appellees were invited to join the association and to abide by its rules, but refused to do so (Q. 21, 22, page 43, Miss Kinnear).

In May, 1907, a member of the Association other than the appellants namely, Funk & Wagnall's, published the copyrighted book "Tarry Thou Till I Come," under the rules of the Association as a

net book, to be sold by retailers at $1.40. Appellees had purchased quantities of this book, and sold them at $1.24. Thereupon the American Publishers' Association issued a circular to all publishers and wholesale booksellers and retail book dealers, to refuse any kind of dealings with R. H. Macy & Co. (Q. 23, 24, 25, 26, Kinnear page 43; X-Q. 107, 108, 109, 110, 111, 112, Emory, pages 60, 61; Appellants' Exhibit 9, 93).

Charles Scribner & Sons were members of the Publishers' Association and thereafter refused to sell to R. H. Macy & Co. books of any kind, whether copyrighted or not, which refusal has continued until the present day. Thereafter the appellees continued to buy books from others, including those published by appellants, whether copyrighted or not, and to sell them at such prices as they saw fit. Their purchases were made from people who knew that they intended to sell them at less than the price fixed by the Association (Q. 97, page 49). In November, 1903, Charles Scribner & Sons brought this action against R. H. Macy & Co. to prevent them from selling the copyrighted books published by appellants, for less than the stipulated price at retail, and to enjoin them from buying any of their books excepting under the rules and regulations of the American Publishers' Association. The bill of complaint and the proofs show that Scribners' *made no contract of any kind with the purchasers of their books whether copyrighted or otherwise*, but that they had printed at the head of their catalogues, and on their invoices, and upon their bills for goods, the following notice:

> "Copyrighted net books published after May 1st, 1901, and copyrighted books pub-

lished after February 1st, 1902, are sold on condition that prices be maintained as provided by the regulations of the AMERICAN PUBLISHERS' ASSOCIATION" (paragraph 7, bill of complaint, page 3; Appellants' Exhibit 9, page 92).

Stolle, who was called by appellant to prove their custom in the sale of books, testified (Q. 6, page 66):

Q. 6. Will you state the methods of selling books at wholesale in use by the complainant, Charles Scribner's Sons since the formation of the American Publishers' Association?

A. A salesman goes, in most cases—that is to say, for stock orders, a saleman goes to a dealer and takes his order and in the other cases the dealer orders by mail or sends a messenger if he happens to be a New York dealer.

Q. 7. What has been done by the complainants with regard to the rules as to net prices and discount allowed on fiction fixed by the rules of the American Publishers' Association

A. They have printed a notice on the catalogue and on all the bill heads declaring that the books are sold only with the understanding that the purchaser shall abide by the rules of the association.

Q. 8. I show you the catalogue of Charles Scribner's Sons, publication for 1903, and call your attention to the notice on the first page. Has that appeared in all the catalogues of the house, a like notice?

A. All the general catalogues.

Mr. Olin.—I offer it.

The paper referred to was marked "Complainant's Exhibit No. 9, August 25, 1904."

Q. 9. Will you produce a bill head of the firm of Charles Scribner's Sons?

A. That is one.

Mr. Olin.—I offer it in evidence.

The paper referred to was marked "Complainant's Exhibit No. 10, August 25, 1904."

Q. 10. Are all the bills of Charles Scribner's Sons for dealings with the wholesale department rendered upon like bill heads?

A. Yes, sir.

Q. 11. *Is any other method taken to bring the rules of the association to the notice of purchasers in the wholesale department?*

A. NOT BY CHARLES SCRIBNER'S SONS.

Q. 12. When a new firm comes to deal with Charles Scribner's Sons that is unknown to you, what do you do?

A. We get what information we can as to their standing and whether or not they will be willing to maintain the rules of the association *by referring the matter to the association for investigation,* or sometimes by sending them this blank which has been presented.

Q. 13. Do you refer to Defendant's Exhibit A?

A. Yes, sir.

Q. 14. *Can you say whether or not these rules are, in one way or another, brought to the attention of every purchaser from the wholesale department?*

A. NO, SIR.

Q. 15. They are not brought to their notice?

A. EXCEPT IN THE WAY I HAVE DESCRIBED, BY THE BILL HEADS AND THE CATALOGUES AND IN CASE OF A NEW PURCHASER, BY CORRESPONDENCE AND SENDING THAT NOTICE IN SOME CASES.

Appellee's Exhibit A above referred to is as follows (page 94):

AMERICAN PUBLISHER'S ASSOCIATION.

.....190....

"In consideration of discount allowed on "books bought from ..... "we hereby agree that for one year from date "of publication we will not sell *net* books at "less than the retail prices fixed by the re- "spective publishers, nor fiction published "after February 1st, 1902, at a greater dis- "count than 28 per cent at retail, as provided "by the rules of the American Publishers' As- "sociation. We further agree that we will not "sell books published by members of the "American Publishers' Association to any "dealer known to us to cut prices of *net* books "or of new fiction except as above provided."

Mr. Emory, the manager of the American Publishers' Association testified that Exhibit A was not signed by anybody except *newcomers in the business* (Q. 45, 46, 47, 48, 49, 50, 51, page 55). He further testified (Ex. Q. 56, page 56) that if they were asked to sign this notice and refused to sign it, the trade was still allowed to sell to them, and would sell them. It is very clear therefore that the sales made by Charles Scribner & Sons of their books at wholesale were *absolute* and *unconditional;* that purchasers from them were never asked to make *any* agreements with them to obey the rules of the American Publishers' Association, either as to limitations of price, or the persons to whom they were to be re-sold. That if there was any doubt about any person in their line the

American Publishers' Association investigated the matter and determined whether an individual was to be sold to, or was not to be sold to; whether the rules had been broken and what penalty was to be inflicted (Stolle Ex. Q. 48, 49, page 71; Ex. Q. 95, 96, 97, 98, 99, 100, 102, page 74).

On the other hand, if a new member of the trade, or one about whom the trade was in doubt, made application for books the matter was referred to the Publisher's Association, before sales were made, and the pledge to the Publishers' Association (Defendant's Ex. A) was executed before deliveries were made (Ex. Q. 48, 56). There is no dispute about these facts. There is no attempt made, either to allege or to prove a direct contract, or any contract, between the wholesaler or retailer and the appellants that the *particular* books purchased, would be sold only under the restrictions adopted by the American Publishers' Association; to wit, either at the full retail price, or to any dealer who would undertake not to re-sell except at the full retail price, or who had so re-sold. The very carefully drawn pledge (Ex. A) was made, not to the appellants, but *to the American Publishers' Association.* The enforcement of that pledge lay not with the appellants but with the *American Publishers' Association.* That association had sole power of investigating a breach and of condemning or condoning it.

This is the sale which appellants call a "conditional" sale, or a "restricted" sale. No contract on the part of vendees or sub-vendees exists either in writing, or orally, assenting to any of the regulations of the American Publishers' Association. There is proof that the appellees purchased the books from individuals who knew (in

fact, it was commonly known throughout the trade) that the appellees were determined *not* to submit to the dictation of the American Publishers' Association, and the American Booksellers' Association, and that they refused to purchase any books with any agreement which tended to restrict their powers of sale. For this attitude the two associations had decreed them outlawed and had forbidden sales to them of books of any kind by any member of either association (Ex. 9, p. 93, Q. 21, page 54).

The appellants claiming to be the owner of thirty-six copyrights on thirty-six different books, and relying only upon the notices published in their catalogues, and on their bill heads and invoices, that the books were sold subject to the rules of the American Publishers' Association, brought this action on the theory, that a violation of the rules and regulations of the American Publishers' Association, constituted an infringement of their copyrights.

R. H. Macy & Co., defended this action on the theory that no contract of any kind had been made by any purchaser with Scribner & Sons; that if any contract was made, it was made with the American Publishers' Association and could not be enforced by the Scribners, and that even if a contract of the character described in paragraph 3 of the Association rules, had been made directly with every purchaser of the books, such a contract is no reservation of any monopoly granted by the copyright statutes, and that when Scribners had parted with an indefeasible title to their books, which they had sold for a compensation satisfactory to them, no restriction upon the further sale could be enforced *pursuant to the copyright statutes.*

As an additional defense, the appellees alleged, that the American Publishers' Association and the American Booksellers' Association, were engaged in an unlawful combination or conspiracy to maintain prices; that the rules alleged by the appellants in their bill of complaint were unlawful, in that they were the results of the unlawful combination, and that a court of equity should not lend itself to the enforcement of them. On exceptions duly filed Mr. Justice Lacombe ruled that these allegations setting up the unlawful combination and the illegality of the rules, were impertinent.

The rules and regulations of the American Publishers' Association, which were annexed to this bill of complaint, were declared to be unlawful by the New York Court of Appeals. In *Straus* v. *American Publishers' Association,* 177 N. Y., 473, the combination was declared illegal for the reason that it covered uncopyrighted books as well as copyrighted books, but Judge Parker intimated that the owners of various copyrights, having the grant of a Federal monopoly, had the right to combine their various monopolies, without violating the *State* Anti-monopoly law. The subsequent proceedings in the litigation in the State Court are referred to on page 19 of appellants' brief. There is no reference to them whatever in the record, and they are wholly immaterial upon this appeal.

Appellants bill heads and catalogues refer only to the rules of the American Publishers' Association and the American Booksellers' Association in force at the time this action was begun, and which were declared illegal by the Court of Appeals.

This case came on for final hearing before Hon. George W. Ray, on January 17, 1905, and an opinion was filed July 11, 1905, and decree dismissing the bill of complaint was entered on August 12, 1905.

Complainant appealed to the Circuit Court of Appeals, which affirmed the decree unanimously.

Argument.

The main question of law involved in this appeal is the same as in the Bobbs-Merill case, (*No. 176* on the present calendar of this court), and may be briefly stated as follows: Can the owner of a copyright by virtue of the copyright statutes, after he has parted with the title and possession of the book, control the ultimate retail price of a book published under his copyright, in the hands of one who has acquired an indefeasible title by purchase from vendees, or sub-vendees of the copyright owner?

Unless complainant bring themselves within the protection of the copyright statute, this suit must fail as the requisite jurisdictional facts are not present, either in so far as diversity of citizenship or amount involved is concerned.

POINT I.

THE COMPLAINANTS HAVE WHOLLY FAILED TO SHOW IMPAIRMENT OF ANY RIGHTS PROTECTED BY THE COPYRIGHT STATUTE.

The appellants contend that the mere printing on their bill heads, on their catalogues, and their

invoices of a notice to the effect that they are selling their copyrighted books subject to the condition that the price be maintained as provided by the rules of the American Publishers' Association, constitutes a reservation of some portion of the incorporeal right granted by the copyright statutes, which they can take advantage of to restrain parties in no contractual relation with them or their vendees from selling such books on any other terms or to any other persons than those prescribed by the American Publishers' Association.

It is difficult to see how even the theory of the patent decisions relied upon by appellants would cover the facts in this case, but assuming, without admitting, that the complainants, as owners of copyirghts, had entered into contracts with vendees to observe and maintain the fixed prices at retail, and had further made contracts with wholesale dealers that they should obey the rules of the American Publishers' Association by refraining from a re-sale to any retailer *known* to them to cut the prices, could the complainants, by virtue of the copyright statute restrain a retailer, who was not bound by any contract from disposing of such books at any price that he saw fit, or are the remedies of the complainants the ordinary remedies for a breach of contract, which would be available to him in case the books were uncopyrighted.

If the latter view prevails, to wit, that the ordinary remedies springing from contract must be invoked, then this court has no jurisdiction.

If some right to control the sale of a book after the title thereto has passed from the owner of the copyright through a chain of successive dealers, each of whom has obtained and transferred an ab-

solute title, can be asserted at all, it must be based upon some express act of Congress, or it must result as a necessary incident to the rights granted by Congress. Otherwise it does not exist, and this action must fail.

The appellants seek to sustain their right of control of the retail prices through that provision of the statute which gives the owner of the copyright the sole right of "*vending*"; that pursuant to the wording of the statute they have not only the right of first sale, but also the right of a restricted or limited sale.

Judge Townsend, in his opinion in the court below, points out that the right of a restricted publication exists at common law, and that that right must be abandoned when the statutory protection of copyright is secured.

The provision of the Constitution was adopted as expressly stated therein for a special purpose, for a special class, and for a special object. The legislation which followed must be interpreted in the light of that constitutional provision and of the intent with which it was passed.

Viewed from that standpoint it is necessary to examine the precise nature and character of property rights which were in existence prior to copyright legislation, and to what extent new rights were created and old rights abandoned.

Before the art of printing had been discovered or rather perfected, copyrights were practically unknown. The slow and laborious reproduction of an author's work partially protected him in the enjoyment of any profits to be derived therefrom, but when the art of printing made it possible to reproduce thousands of copies in a short time where formerly but one could have been pub-

lished, anyone could without compensation to the author, multiply copies of an important or popular work and sell the same, thus securing to himself the benefits of another's work.

In England, during the fifteenth and sixteenth centuries, the Crown, through the Star Chamber, granted monopolies for printing certain works, either for the purpose of conferring special privileges upon a favored individual, or for the further and more important purpose of controlling the character of the printed matter, and establishing a government censorship fatal to the growing liberty of the press.

It was not until the reign of Anne that Parliament "for the encouragement of learning by vesting the copies of printed books in authors, &c." intervened for the protection of authors. By the statute of Anne, authors, or their assigns, were granted the exclusive privilege of "printing, reprinting and publishing" copies of their work.

After that period an interesting contention arose in England as to whether the common law recognized the species of property created by the statute law, or whether that statute created a new species of property, and it was finally decided-1774, in Donaldson *vs.* Beckett, 4 Burr, 2408. that whatever rights existed at common law were taken away and superseded by the statute.

All the details of that controversy and its result must have been familiar to many of the framers of the constitution. A number of them were authors, many of them lawyers of great renown, and adopting Section 1, Article 8 of the Constitution, it is obvious that they intended to secure to authors some right of property which they did not possess at common law.

The members of the first Congress, who no doubt were equally familiar with the bitter discussion which had convulsed literary England concerning the rights of authors, pursuant to the provisions of the Constitution to secure to authors the exclusive right to their writings for a limited period, passed the first copyright act which is almost identical with the statute of Anne. It is entitled

> "An act for the encouragement of learning *by securing copies of maps,* charts and books to the authors and proprietors of such copies during the times herein mentioned."

By its first section authors are granted "the sole right and liberty of printing, reprinting, publishing and vending such maps, book or books for fourteen years," and that right has since been granted in substantially the same words by succeeding legislatures.

Congress did not enact, and had no power to enact legislation which conferred on authors any rights which they had previously possessed under the common law, nor to invest them with any greater powers than they had previously possessed either at law or in equity for the protection or control of their property, but Congress sought to, and did, create *a new kind of property,* a new species of possession which at the common law had no existence, and which but for such legislation, could not have been enjoyed. A property right was created in an "incorporeal notion," entirely detached from any physical existence. A right not recognized by the common law.

Wheaton *vs.* Peters, 8 Peters, 591.

That right, as its name imports, was the *right to copy* and nothing more, and this has been the universal interpretation of the monopoly.

> "Copyright may be defined as the sole and exclusive liberty of multiplying copies of an original work or composition." (Coppinger, Law of Copyrights, 3rd Ed., page 1.)

The English Statutes, on which our own are based, expressly limit the meaning of the protection granted to the right to *multiplying* copies and grant no more.

The Belgian codification of 1886 reads as follows:

> "Copyright Law—Article 1. The author of "a literary or artistic work has alone the "right of *reproducing* or of *authorizing* its "reproduction in any manner and in any "form whatsoever." (*Coppinger, page 655.*)

The copyright law of Holland, 1881, provides:

> "The right of publishing in print writings, "illustrations, maps, musical and dramatic "works and oral addresses, as well as the "right of performing or of presenting musi- "cal and dramatic works belongs exclusively "to the author and his assigns." (*Coppinger, page 655.*)

In the German Empire the law of 1876, January 10, says:

> "The right of *reproducing* a work of liter- "ature by mechanical processes belongs ex- "clusively to the author of the same." (*Coppinger, page 681.*)

Similar provisions giving the right of *multiply-*

ing to the author are contained in the laws of almost every other country of Europe.

In each of them the avowed purpose has been, and is, to secure to authors the exclusive right to their works, and the practically universal method of securing to them such right is by granting to them the monopoly of *reproducing* or *multiplying* and the experience of the civilized world has proven that the right thus granted of multiplying is ample protection to the author. When the book thus protected from reproduction by any other person than the author or his assigns has been published, it becomes the subject of barter and trade like any other commodity, and subject to the general laws of the land.

As was said in *Stephens* vs. *Cady*, 14 Howard, 528-530:

> "The copyright is an exclusive right to the *multiplication* of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in Millar *v.* Taylor, 4 Burr., 2396, 'A property in notion, and has no corporeal tangible substance.'"

In that case the sheriff seized a copper plate from which copyright maps had been printed. The seizure and sale of the plate itself was upheld, but the right to print maps therefrom was denied. The Court emphasizes the distinction between the incorporeal rights secured by the copyright and ordinary rights attaching to tangible property in the following language:

> "The copper plate engraving, like any other tangible personal property, is the sub-

ject of seizure and sale, on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, *to multiply copies of the map*, by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process—certainly not at common law."

The same principle was declared in *Stephens* v. *Gladding*, 58 U. S., 447.

In the case of American Tobacco Co. *vs.* Emil Werchmeister, 208 U. S., 72, Mr. Justice Day reiterates this view in considering the nature of the property in copyright which it is the object of the Statutes of the United States to secure and protect. He says:

> "As we have seen the purpose of the copyright law, is not so much the protection of the possession and control of the visible thing as to secure a monopoly having a limited time of the right to publish a production which is a result of the inventor's thought."

At another point he says:

> "And a strong consideration in construing "this statute has reference to the character "of the property sought to be protected. It "is not the physical thing created, but the "right of printing, publishing, copying, etc., "which is under statutory protection."

At common law an author had the so-called rights of literary property. If he wrote a book and printed it, he had the exclusive right to sell it, in any way that he deemed fit. But such publication and sale would have thrown open to the

world the right to *re-copy* the book. If he did not sell or publish his own book, no one had the right to copy it. To a limited extent he could even disclose its contents, and still remain the sole and exclusive owner thereof, and of the right of multiplying it. These rights exist to-day independent of the copyright law.

See

Jeweler's Mercantile Agency v. *The Jewelers' Weekly Pub. Co., 155 N. Y., 241.*

Werckmeister v. *Am. Lithographic Co., 134 Fed. Rept., 321,* cited with approval in American Tobacco Co. *v.* Werckmeister (*supra*).

When the statute granting the copyright has been complied with, the author or his assigns has the exclusive right to print or reprint and publish, and none other which is not common to the possession of any other kind of property. The distinction between the common law rights of authors and those conferred by copyright are stated in *Palmer* vs. *DeWitt,* 47 N. Y., 532, at page 536, the Court of Appeals says:

> "The author of a literary work or composition has, by law, a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. When once published it is dedicated to the public, and the author has not, at common law, any exclusive right to multiply copies of it or to control the subse-

quent issue of copies by others. The right of an author or proprietor of a literary work to *mutiply* copies of it to the exclusion of others is the creature of statute. *This is the right secured by the 'copyright laws' of the different governments.''*

See *Werkmeister* vs. *American Lithographing Co., 134 Fed. Rep., page 321, at page 324.*

The only protection necessary to secure to authors the exclusive rights to their productions, is the grant of the exclusive right to *multiply* copies after publication, hence the term "copyright."

To secure that statutory right he abandons his common law right of restricted publication. He

"cannot have at the same time the benefit of "the copyright statute and also retain (his) "common law right. No proposition is bet- "ter settled than that a statutory copyright "operates to divest a party of his common "law right."

Jewelers' Mercantile Agency v. *Jewelers' Pub. Co., 155 N. Y., 241, 247.*

Drone on Copyright, 100.

Holmes v. *Hurst, 174 U. S., 182.*

The copyright law does not therefore grant to him the power of sale, as that was in him at all times, nor did it intend to enlarge it, but it does grant to him the sole right to multiply, which, after a sale, the common law did not reserve to him.

Wheaton v. *Peters, 8 Peters, 725.*

The reason for copyright legislation largely lies as before said in the invention of printing and no claim thereto was ever raised prior to the easy multiplication of books by reason of the invention of that art. Such is the reason of the law and such is its extent and throughout the history of copyright legislation no other or further meaning was ever given thereto. The *intangible right* which formerly did not exist is now protected. Tangible property, which is the result of the exercise of the right granted, has precisely the same attributes as any other species of tangible property, and all questions relating thereto should be treated as questions of contract, and not as of the inherent meaning and effect of the copyright law.

Keeler vs. *Standard Folding Bed Co., 157 U. S., 659.*

Now, in the case at bar it is plain that title was passed to the defendants. So far as shown by the evidence there was no contract, either by them, or by any intermediate wholesale dealer from whom they purchased the books, that the printed notice on the bill heads should be observed. In their hands an absolute legal title to the books vested, which was seizable on execution against them, and which they could, if they saw fit, give away without any consideration whatsoever. The complainants do not claim a forfeiture of the title to the books, nor any interest in those particular copies.

The evidence discloses no reservation of control over those particular copies. The complainants merely advertised that *they* intended to obey the rules of the association, and that if the *purchaser*

did not obey those rules, the association would see to it, that he was punished. The penalty plainly was to be inflicted through the united action of the trade and not by virtue of any reserved rights.

The benefit of the statute is claimed, therefore, not for the author or owner of the copyright, but for the retail dealer, which clearly is not within the spirit of the statute, and if it were within the letter, it would be unconstitutional. The right claimed by the complainants, is complicated by choosing the word "license" in the argument. That cannot be made a license which in law is not a license, by merely calling it so. There is a well-established difference between a sale and a license. A *sale* transfers the absolute ownership and the legal title, with all its incidents. A license conveys no title at all; it merely gives a right to do something with the property of another, which theretofore the licensee did not have. In this particular case of books, a license to sell would mean, that the owner of the copyright, being at the same time the owner of the copies of the book, has authorized some individual to sell the same, *reserving to himself the title to the book and the power to dictate the terms of sale*, but the licensee would have no interest in the book sold, even though he might have an interest in the copyright itself.

This identity of ownership of the book and of the copyright is the controlling factor necessarily present in order to retain dealings concerning the book itself within the protection of the copyright law, and when that identity is destroyed, the book, independent of the right to reproduce, is entirely out of the sphere and scope of the copyright stat-

ute. This is the particular point emphasized by the Courts in the very few cases in which the question has been discussed.

In *Publishing Co.* vs. *Smythe, 27 Fed. Rep., p. 914,* Judge Hammond says:

> "The owner of the copyright *may not be able to transfer the entire property* in one of his copies, *and retain for himself an incidental power to authorize a sale of that copy,* or rather the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate to be protected by the copyright statute; and yet he may be entirely able, *so long as he retains the ownership of a particular copy for himself,* to find abundant protection under the copyright statute for his then incidental power of controlling its sale. The copyright incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property—copyrighted articles, like any other—is a thing that *belongs alone to the owner of the copyright itself, and as to him only so long as,and to the extent that he owns the particular copies involved.* Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other—swallows it up, so to speak, *and the two cannot co-exist in any owner of the copy except he be the owner at the same time, of the copyright; and, in the nature of the thing, they cannot be separated so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy.*"

In *Harrison* v. *Maynard-Merrill Co., 61 Fed.*

Rep., 689, a decision of the Circuit Court of Appeals of the second Circuit it is held:

> "The owner of a copyright who has transferred the title of copyrighted books under an agreement restricting their use, cannot restrain by virtue of the copyright statutes, sales of said books in violation of said agreement. He is confined to his remedy for a breach of contract."

Judge Shipman, in the course of his opinion, says at page 690:

> "The question as it arises upon the appeal and affidavits is, Can the owner of a copyright restrain, by virtue of the copyright statutes, the sale of a copy of the copyrighted book, the title to which he has transferred, but which is being sold in violation of an agreement entered into between himself and the purchasers; or are the remedies of the original owner confined to the remedies for a breach of contract?"

And in urging the conclusion that no remedy is granted under the copyright statutes and in reliance upon *Clemens* v. *Estes*, 22 Fed. Rep., 899, and *Publishing Co.* v. *Smith*, 27 Fed. Rep., 914, he confines the rights of the owner of a copyright to the period when the title to the book and to the copyright are identical and that when this identity is destroyed no rights are granted pursuant to the statute. He says at page 691:

> "This right to enjoy the benefit of the copyright statutes results from the fact *that the owner has never parted with the title to the book or the copyright*, although he parted with the possession of the book. But the right to restrain the sale of a particular copy of

the book by virtue of the copyrighted statutes has gone when *the owner of the copyright and that of the copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes.* The new purchaser cannot reprint the copy. He cannot print or publish a new edition of the book; but the copy having been *absolutely sold to him, the ordinary incidents of ownership in personal property, among which is the right of alienation attach to it.*"

In *Werckmeister* v. *American Litographic Co., 134 Fed. Rep., 321,* at page 329, Mr. Justice Townsend expressly approves of the decision in those cases.

In *Doan* v. *American Book Co., 105 Fed. Rep., 772,* the Circuit Court of Appeals of the Seventh Circuit, following Harrison *v.* Maynard, held that the sale of a copyrighted book carried with it all the ordinary incidents of ownership in personal property, including the right of alienation.

In *Kipling* v. *G. P. Putnam's Sons et al, 120 Fed. Rep., 631,* the Circuit Court of Appeals, Judge Cox writing the opinion, refers to the case of Harrison against Maynard and Doan against American Book Co., as setting forth well-known and well-recognized principles of law.

In an action brought in the United States Circuit Court in the Eastern District of Pennsylvania, on a motion for an interlocutory injunction, Judge Holland in August, 1904, says in *Bobbs-Merrill Co.* v. *Snellenburg, 131 Fed. Rep., 530-533*:

"But the right to restrain the sale of a par-

> ticular copy of a book by virtue of the copyright statute has gone when the *owner of the copyright and of that particular copy has parted with all his title to it*, and has conferred an absolute title to the copy upon the purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes."

The copyright statute itself contains provisions clearly indicating that only the right of republication is intended to be protected. Section 4964 defines an infringement of the copyright and imposes the penalties for the same.

> "SEC. 4964. Every person, who after the recording of the title of any book and the depositing of two copies of such book, as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses print, publish, dramatize, translate or import, *or knowing the same to be so printed, published, dramatized, translated or imported, shall sell or expose to sale* any copy of such book shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

This section of the Statute must be construed with the whole act and as a portion thereof and must be looked to for the purpose of determining what rights Congress intended to confer and protect and as pointing out the way it deemed those rights could be infringed, and imposing

penalties, not known to the common law, as punishment for an infringement.

Now what are the violations which Congress thus guards against? Every person is forbidden, *without the consent* of the proprietor of the copyright, to print, publish or import the book. Whoever does this, whether he has notice or not of the rights of the owner of the copyright is guilty of an infringement. This is entirely consonant with the general idea of a grant of monopoly by the government to the individual. The absence of a notice of the fact that he is doing a wrong, in no way affects the fact that he has committed a wrong upon the rights of the owner of a copyright. Now, when it comes to *a sale* of a book constituting an infringement of the right granted by the statute, Congress has expressly limited the liability to those cases in which the seller had *notice* of the wrongful printing, publishing or importation.

Congress has here pointed out that it did not intend to punish as an infringement under the copyright law the *sale* of a book *legally printed*, published or imported, and a reasonable construction of the grant of monopoly accomplishes the whole purpose contemplated by the Constitution or Congress. In grants from the government to the individual, especially where they confer exclusive privileges, the rule has even been, and has been most emphatically reasserted by the United States Supreme Court, in the recently decided case of *Metropolitan Street Railway Co.* vs. *The People of the State of New York, 199 U. S. 37*, that nothing can be included in the grant which is not expressly conferred by it, or is necessarily incidental to the powers intended to be conferred.

In the case of the copyright statutes the definition of Congress as to what does or does not constitute an infringement by a sale must be construed in favor of the public and against the monopoly.

The sale of the book printed, published or imported *with the consent* of the owner of the copyright is not an infringement. A sale of the book printed, published or imported *without the consent* of the owner of the copyright is *not* an infringement, *unless there be knowledge* of the unauthorized reproduction in the person who attempts to make the sale. Section 4965 makes a similar provision as to maps, charts, prints, etc. The statute, therefore, limits and defines the protection that it intends to afford. The printing, publishing or importing of a copyrighted book is an infringement whether there be knowledge or not in the person committing the act, and is prohibited and penalized, but the sale of a copyrighted book is punished only if there is a concurrence of two essential features: first, that the book be printed, published or imported *without* the consent of the owner, and secondly, that the sale was made *with knowledge* of it. The absence of either feature defeats an action for infringement.

In the case at bar the printing of the books was authorized, and a sale of the authorized copy is not punishable under the statute.

The statute not only protects the printing, but also the *publishing* of the book, but when the book has been lawfully printed and published, a sale thereof by third persons passes beyond the control of the statute, unless accompanied by notice that such printing or publishing is unlawful. And this is clearly the theory upon which *Clem-*

ons v. *Estes, Harrison* v. *Maynard* and *Bill Publishing Co.* v. *Smyth* proceeded in their decision.

Appellant's interpretation of the word "vending" is inconsistent with their own theory of copyright. It is conceded that the rights granted by the Statutes are entirely distinct from the thing created thereunder. One is the incorporeal and intangible property in notion created and endowed by the legislature with peculiar characteristics and protected by special remedies, exclusive jurisdiction over which rests in the Federal courts. The other, the tangible thing, is personal property with all the characteristics that attach to other species of personal property, and subject in like manner to the laws of that state which control the owner's other personal possessions. The transfer of the title to, or interest in, the one carries with it no title to or interest in the other. An assignment of the copyright transfers no interest in the books published, and *vice versa* an assignment of the book published transfers no interest in the copyright itself.

American Tobacco Co. v. *Werkmeister, 208 U. S. 72.*
Stephens v. *Cady* (*supra*).
Stephens v. *Gladding* (*supra*).

The "vending" or sale of a copy of a book transfers the title to that particular copy and nothing more. It does not transfer one single vestige of the intangible right granted by the statute. The payment of the royalty upon that sale emancipates that particular copy from the dominion of the copyright,

Keeler v. *Standard Folding Bed Co., 157 U. S., 660,*

without in the slightest degree diminishing the proprietor's monopoly of vending other copies.

Counsel for appellant concedes (page 56, brief) that the transfer of the title of a particular copy without any reservation emancipates that copy from the copyright, but insists that the copyright owner can reserve to himself some portion of the monopoly of vending by a reservation. This denies the theory that *no portion of the monopoly* is transferred to the purchaser of a copy. The proprietor has not parted with the exclusive right to print, publish, finish or complete the book, although the sale contains no special reservation. If he has not conferred any exclusive rights under the copyright act, how can the proprietor *reserve* to himself some right thereunder? In order to sanction complainant's claim, the court must hold that none of the rights to which the proprietor has become entitled by virtue of Section 4952 of the Statute is transferred to a purchaser by a sale of a copy of the book, excepting the right to "vend," that that particular portion of incorporeal right *does* attach to and form part of the physical object created, and *is transferred therewith.* It would then logically follow that the purchaser of a copy without reservation acquires an interest in the copyright to this extent that he could impose restrictions as to the vending of that particular copy, which by reason of a "reservation" to himself he could enforce *by virtue of the copyright statute,* although not the owner of the copyright itself. The purchaser of an entire edition might find such a right very profitable.

The restriction in the case of Harrison *v.* Maynard, criticised by appellants (page 56, brief) were imposed by a purchaser, who therefore, according

to appellant's view, had acquired some interest in the copyright by reason of his purchase without restrictions.

That interpretation is, however, negatived by the statute itself, which as before pointed out, makes a *sale* of the article an infringement of the copyright only in case the vendor knows that he is seling a copy printed or imported without authority.

The purposes of the constitution and of the statutes are completely satisfied by the interpretation given to it in the court below to the effect that the copyright owner has the sole and exclusive right of first sale. If, upon such sale, any restrictions are imposed the rights of the parties depend altogether upon the common law and equity principles, and not upon the statute.

Dale Tile Co. v. *Hyatt, 125 U. S., 46.*
Excelsior Wooden Pipe Co. v. *Pacific Bridge Co., 185 U. S., 282.*
Albright v. *Teas, 106 U. S., 613.*

Counsel wholly ignores section 4964, which defines an infringement. In the Bobbs-Merrill Case, counsel claimed that section 4970 gave a court of equity a larger power, while courts of law were limited by section 4964.

Counsel in the Bobbs-Merrill case conceded, however, that these two sections "are intended to and do furnish different remedies, one at law and the other in equity *for the same wrong*" citing:

Stephens v. *Gladding, 17 How., 447.*
Calligan v. *Meyers, 128 U. S., 617.*

This view is supported by authority. Section

4952 is the grant of the monopoly; Section 4964 defines what shall constitute an invasion of those rights of monopoly and provides for penalties without prescribing a remedy. The provisions therein apparently contemplate an action at law for penalties. Section 4970 grants the right to prevent the *future* continuance of the wrongful acts described in Section 4964 by injunction, and the ascertainment and award of damages for past infringements. In so far as the cause of action is concerned and the wrong to be remedied, Section 4964 and 4970 are co-extensive. They differ only so far as the extent and nature of the remedy is concerned.

Bolles v. *The Outing Co., 77 Fed. Rep, 966.*

Bolles v. *The Outing Co., 175 U. S., 262,* cited with approval in *Werchmeister* v. *American Tobacco Co., decided December 16, 1907.*

Point II.

OWING TO THE DIFFERENCE BOTH IN THE THEORY AND THE LETTER OF THE PATENT AND COPYRIGHT STATUTES, THE PATENT CASES RELIED UPON BY COMPLAINANT ARE INAPPLICABLE TO THE QUESTION OF COPYRIGHT HERE PRESENTED.

The sole similarity between the patent and copyright laws is that they both create a new species of property, which at common law was but dimly recognized. Both cover intangible, incorporeal

productions of the brain. This is the limit of the similarity. Their ultimate effect and purpose is wholly dissimilar.

In the one case the idea is embodied in some useful or novel invention, and the statute covers not alone the idea, but the product thereof, as well as all applications of that idea to any other form or any other useful machine. In the other, the *idea* becomes free to the world to use or not, as the individual taste of the reader may require. The protection that is accorded is to that identical idea in substantially that identical form; that is, the words in which the author has clothed it, shall not be reproduced by anyone else without the author's consent, but the right to utilize that intangible idea and make a practical application of it, to the affairs of the world, has wholly passed out of *the control* of its author, and has become public property. This material distinction is evident from a comparison of the respective statutes.

An application for a patent is subjected to a quasi-judicial examination before it is granted. Not so with a copyright. The mere compliance with certain provisions as to filing, etc., secures the grant.

When granted, the patent gives to the inventor the sole right to make, use and sell his invention. The *user* of it is especially granted as a monopoly to the patentee. In the copyright he has only the right to print, and sell. There is no monopoly as to user. It is only, as before pointed out, the right to multiply that is protected.

Under the patent law, Sec. 4886, *the whole or any part thereof is made the subject of assignment.* Under Sec. 4915, a copyright cannot be assigned, *except as a whole;* a clear recognition that

there is only one field of monopoly granted, which cannot be disposed of in parcels, whereas the patent law makes special provisions for subdivision of the field of monopoly granted.

The patent law fails to describe what is and what is not an infringement. The copyright law is very particular in setting forth (paragraphs 4964-4965), that anyone who, without the consent of the proprietor first obtained and signed in the presence of two witnesses, prints, publishes or imports the book, or *knowing* the same to be so printed, published or imported shall sell the same, is guilty of an infringement, and the penalties therefor are fixed.

Finally, the right to a renewal is given to the author or his widow or heirs, it is not the subject of an assignment, whereas under the patent law all renewals and re-issues are the subject of assignment when the patent is first issued.

The two chief differences which are relied upon to distinguish the copyright from the patent cases are those which provide, first of all, a *user in the patentee*, which is lacking in the copyright, and, secondly, the direct power granted to the patentee, and not to the owner of a copyright, to *subdivide his field of monopoly in whatever way he sees fit.*

Counsel (page 42 of the brief) seeks to establish control of the field of use under the copyright statute. He claims (page 43) "the cases show that leaving out of sight what is known as 'fair use' all of the rest of the field of use belongs absolutely to the owner of the copyright," citing a number of instances, such as abridgment, dramatization, translation, etc. It is very apparent that the term "use" in copyright litiga-

tion does not cover the same term in patent matters. The use of a book referred to is the unlawful use of the identical idea in the identical form in the preparation of some other book. It is an invasion of the author's right of *copy* and not of his right of *user*.

This distinction is pointed out in Baker *vs.* Seldon, 101 U. S., 99, where Mr. Justice Bradley says:

> "The difference between the two things, letters patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book upon the subject (as regular physicians generally do), he gains no exclusive right to the monopoly of sale of the medicine, he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the medicine as a new art, manufacture or composition of matter. He may copyright his book, if he pleases, but that only secures to him the exclusive right and privilege of publishing his book. So of all other inventions or discoveries.—The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated *if the knowledge could not be used* without incurring the guilt of piracy of the book, and where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art and given therewith to the public; *not given for the purpose of publication in other works explanatory of the art but for the purpose of practical application.*"

The purchaser of a copyrighted book is at liberty to make any use that he pleases of the physical object that he has purchased, and not even counsel for appellant has claimed the right to curtail that power. He can read the book, if he chooses, and make a practical application of any idea contained in that book without hindrance. He can use the book for purposes of reference in conjunction with other books, if he so desires, but he cannot republish substantial portions of that book without the permission of the author.

The patentee, on the other hand, can require the particular article embodying his invention to be used only in certain specified ways, in a certain territory or for certain purposes.

"The unfair use" referred to by appellants may be perpetrated by one who never had title to the copyrighted book, he may have made his unlawful copy from a book in a public library. "The unfair use" may have found its source in a number of different copies of the same book.

The remedy that the courts would grant would be to enjoin the sale of the book containing the unfair use, whereas in a patent it would restrain the use of the specific article containing the patent, or forbid a continuance of the use.

"Unfair use" in copyright is precisely the same as the manufacture of a new article containing the "idea" covered by another patent.

Bearing these two distinctions in mind, an examination of the cases under the patent law relied upon by the complainant will disclose their utter inapplicability to the copyright law.

The chief case, and one which pushes the principle contended for to its furthest limits, even under the patent law, is the case of

Victor Talking Machine vs. *The Fair*, 123 Fed. Rep., 424,

a decision of the Circuit Court of Appeals of the Seventh Circuit.

That was an action for the infringement of a patent gramophone. Upon each instrument sold the complainant had affixed in a permanent manner and in a conspicuous place a notice to the effect that the machine was registered on a certain number, and

> "is licensed by us for sale and *use* only when "sold to the public at a price not less than $25. "No license is granted to use this machine "when sold at a less price. Any sale or *use* "of this machine when sold in violation of "this condition will be considered as an in- "fringement of our United States patent."

The defendant bought the machines from jobbers, and with full knowledge of the restrictions under which the jobbers took them, they sold them for $18 at retail, instead of $25, as required by the notice.

A demurrer to the complaint was sustained by the Circuit Court, but was reversed by the Circuit Court of Appeals. In the course of its opinion the Court says:

> "Without applying to the patent office, one "may make and use and sell the device that "embodies his invention. That is his natural "right. All that the Government can and "does grant him is the right to exclude others "from practicing his invention without his "consent. Within his domain the patentee "is czar. *By its terms the grant covers three "separate or separable fields: The patentee "may agree with one that he will not exclude "him from making; with another, from*

"using; and with yet another, from selling,
"the devices that exemplify the principles of
"his invention."

It will be observed that the Court, in that case, enumerates the *three separable fields* of the monopoly and the power vested in the patentee to dispose of each one separately. Although the exercise of this power to the extent claimed in this decision is questionable and seems to be contrary to a number of dicta of the Supreme Court, still conceding, for the purposes of this argument, that it is a correct enumeration of the powers granted by a patent, it is clear that it has no application to the copyright statutes.

The user of a book is absolutely beyond the control of the owner of a copyright, and even if there be a sub-division in terms into separate grants of monopoly, they are not made separable by the statute. Provision is made only for an assignment of the whole of the monopoly, but not for any part thereof. The two main characteristics upon which the Court based its decision are therefore lacking. The notice itself restricted the use except under certain conditions. The Court dwells upon the separate and *separable* fields of monopoly as the grounds for its decisions. The theory of that case, therefore, is that owning three separate fields, the patentee can grant any one or any portion of any one field and unless he grant the whole of that field, he has reserved unto himself so much of the monopoly that anyone who wanders beyond the strict letter of the grant trespasses upon the reserved monopoly, and this can only be claimed by virtue of the statute which creates the three separate fields, and, by making

provision for the sub-division likewise makes those fields separable.

The cases relied upon by the Court invariably pursue the same reasoning.

Edison Phonograph Co. vs. *Kaufman, 105 Fed. Rep., 960.*
Edison Phonograph Co. vs. *Pike, 116 Fed. Rep., 863.*
National Phonograph Co. vs. *Ladler, 128 Fed. Rep., 783.*

Not alone do those cases depend upon different separate provisions, but there are furthermore differences in the facts which even under the patent statute would present difficulties for the application of the principle.

In the patent cases, the owner reserved to himself a portion of the field of monopoly expressly granted, to wit, the right to use and sell, and notice of that reservation was conspicuously affixed to each and every product under the patent.

In the case at bar, there is no reservation of interest in, or title to each book produced under the copyright; there is no expressed reservation of any right under the copyright law, nor is there any attempt to reserve to the owner of the copyright or the book any rights whatsoever.

Scribners claim that they printed on their billheads a notice in form following:

> "All copyrighted net books published after May 1st, 1901, and copyrighted fiction published after February 1st, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association."

This notice refers to, and was intended to refer to, *all* copyrighted books whether published by Scribner or not. The wholesale dealer who purchased from Scribner was not required to enter into a stipulation or agreement limiting his right of resale. If, however, the notice on the bill can be construed into such a contract, then it is pertinent to inquire in to the extent of the limitation imposed upon him. If bound by the notice, he cannot sell at retail at less than the fixed price, and he cannot sell at wholesale to a retailer *known to him* to sell at less than the fixed price. There is absolutely nothing, however, in his agreement or in that notice, to prevent a wholesaler from selling to *another* wholesaler, without any agreement of any kind, and to transfer to the second wholesaler a complete and absolute title without any restrictions of any kind, and the second wholesaler having acquired a perfect and complete title, unrestricted as to resale, could sell and transfer that title to anyone who would purchase the books without regard to price or person, so long as he was not a member of either of the two associations and bound by his agreement to them to obey their rules. Assuming even, without admitting, that the answer contains admissions as to the restricted or conditional sales that the appellants claim it does, these restrictions and conditions do not cover the sale of a book to a second or third wholesale dealer, who was not a purchaser from the complainants, or who was not under any agreement to maintain the rules and regulations of the two associations.

As a matter of fact, however, complainants' own proof discloses that few, if any, dealers entered into, or were required to enter into any agreement

to maintain prices, but such of them as were required so to do, gave their pledges to maintain prices not to the complainants, but to the American Publishers' Association, and that pledge covered, not the particular books forming the subject matter of the contemplated sale, but a general pledge to maintain the prices of all copyrighted books, and to obey in general the rules of the American Publishers' Association, which covered books copyrighted and uncopyrighted.

The mere fact that the complainants printed a notice upon their billheads and their catalogue, did not create any contractual obligation. It was held in the case of *The Majestic, 166 U. S., 373,* that reference to a notice containing condition on the back of a passenger's contract ticket, but not referred to in the body of the contract itself constituted no contract.

> "A notice or memorandum even though printed upon the bill of lading or other contract with the carrier, unless referred to in the body of the contract and thus made a part of it, is no more than a notice, and does not form a part of the contract between the shipper and carrier."

In that case the notice was printed upon the contract itself. In the case at bar, the notice relied upon, is printed not upon the contract of sale, but upon the bill head or invoice sent after the sale was completed.

But appellant's claim that the answer contains admission of restricted or conditional sales. It is curious that this contention should have been made in the first instance on the argument of the appeal. Complainants evidently did not so construe the answer when they were taking testi-

mony, as they sought to establish by various witnesses the very allegations which they now claim to be admitted (see evidence of Stolle and Emory).

A reading of the answer, however, is conclusive upon the question that no such admissions were intended and that no such admissions were made. The defendants, in several paragraphs, deny that any sales were conditional, or that there were any restrictions of title, or of right under the copyright. (See paragraph 5 of the answer, page 95.) They deny any knowledge as to the notice of any conditions upon which purchasers bought the same (page 96). Paragraph 10 of the complaint charges them with contributory infringement of copyright by inducing purchasers to break their agreements. This is expressly denied (paragraph 9 of the answer, page 96). The admission claimed to be contained in sub-division 6 of the answer, even if it can be called an admission to the extent that is claimed by appellants, is expressly limited to acts of members of the two associations. There is not the slightest proof that the defendants purchased any books from any member of either association.

An absolute title, therefore, to the book sold was passed to jobbers or retailers, who do not appear to have been under any agreement or obligation to enforce the observance of the terms of the notice printed on the catalogues and billheads of the appellants. The wholesale dealers, who sold to the defendants, violated no agreement with the appellants, and invaded no portion of their mc opoly. The facts in this case even were it a patent case, come under the direct terms of the decision of the Supreme Court in *Keely* vs. *Folding Bed Co.*, 157 U. S., 660, at page 666,

which held that one who buys patented articles of manufacture from one authorized to sell them, becomes possessed of an absolute property in such articles freed from all restrictions of any kind.

The theory of the patent cases upon which reliance is placed as to the reservation of either the title, or of some vestige of the monopoly granted by the statutes, is wholly and completely absent.

There is no pretense in this case, that any rights have been reserved, or were intended to be reserved, *by the owners* of the copyright. The rules of the Publishers' Association attached to *sales* of books. All persons were required to *sell* at a certain price at retail. All wholesalers are *forbidden to sell* to blacklisted individuals. Even the punishment for a violation is established. *All books,* whether copyrighted or not copyrighted, come under the rules, when there is a violation as to the sale of a copyrighted book.

In the patent cases relied on there was a specific attempt to reserve a portion of the title, both, to the machine itself and to the field of monopoly of sale.

In so far as reserving a portion of the field of monopoly of sale is concerned, these defendants claim that under the decisions and the theory of the copyright law it exists, if at all, only when there is identity of title of the copyright and of the book published thereunder.

If, however, a separation can take place without impairing the power to control the sale, then not only have these complainants completely failed to reserve to themselves, as far as these defendants, are concerned, any rights under the copyright monopoly, *but they have in addition transferred this monopoly to the American Pub-*

lishers' Association, and voluntarily deprived themselves of the right of exercising it.

The complainants pursuant to the rules of the American Publishers' Association are not free to publish as they choose. They *must* publish for sale at either a net or a restricted price. This is inconsistent with the idea of monopoly. They must sell at retail at that price themselves. They cannot vary it. This is inconsistent with the idea of monopoly. They must not sell their copyrighted, or any book to individuals blacklisted by the American Publishers' Association. This restricts their power of sale and is inconsistent with a monopoly.

The pledge exacted from intending purchasers, or suspected persons, is a promise to the *Publishers' Association,* not to the owners of the copyright. The *Association* determines whether the rules have been broken, and if so, whether the breach shall be punished.

In other words, after their book has been published and sold by them the future sale is regulated, not by complainants, but by the rules of the American Publishers' Association and under its supervision, it can, if it chooses, permit a sale at a less price, or to a person who offends by re-sale to a price-cutter, and unless the American Publishers' Association circulates the name of the offender as one whose supplies must be stopped, no one else has the right to interfere.

Mr. Stolle testified that complainants' books were not sold to any one who was blacklisted by the Association, and if the complainants heard of price-cutting, or other disobedience, they referred it to the Publishers' Association for investigation, who without giving any reason, either restored

the offender to favor, or cut him off from further supplies (pages 70, 71).

If the American Publishers' Association would choose to permit a violation of its rules by certain dealers, or in certain localities, it had the power so to do and the complainants would be bound thereby.

This condition is wholly inconsistent with any reservation of any part of the monopoly in the complainants and can only be interpreted as a voluntary renunciation of those rights in favor of the American Publishers' Association, and any infringement of those rights could logically be prevented only by the American Publishers' Association, the owner and possessor therof.

The cases of *Dickerson* vs. *Matherson, 57 Fed. Rep. 524,* and *Dickerson* vs. *Tingley, 84 Fed. Rep., 192,* were decided on entirely different principles. In those cases it happened that the complainant was the owner, both of foreign and domestic patents for a particular invention, and the Court held that the complainant had a right to, if he so chose, sell goods under the patent of a foreign country and reserve to himself the right to sell under the United States letters patent. Had there been a divided ownership, the question naturally would not have arisen. A sale under a foreign patent without the reservation of the monopoly under other patents, would by estoppel have vested the purchaser with the rights of the patentee in the United States, but there being a special limitation that the sale was made with the reservation of all rights under the United States patent, this estoppel was avoided and the rights granted by this government were reserved.

The case of

Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. Rep., 288,

was especially limited to the *user* of a patent right, and in the course of its opinion the Court made use of expressions which have been relied upon at various times to sustain for the third field of monopoly, to wit, the sale, the same characteristics as for the field of user.

Ignoring the very significant sentence which, by the extension of the principle laid down, wholly loses its meaning, the Court say:

> "The property right of a patentee, is, after "all but a property right, and subject, as is "all other property, to the general law of the "land" (page 293). * * * "Neither the "patentee nor the machine involved in his "invention nor a license for use can be ex- "empted from liabilities and regulations "which in the public interest attach to all "persons and property under the general law "of the land."

In *Bement* v. *National Harrow Co., 186 U. S., page 70,* the Court makes use of certain expressions which the complainant relies upon to sustain its position. That case, however, stands strictly for the proposition that the *owner* of the patent can make a contract with his *licensee* which, with few exceptions, will be sustained. That as between him and his licensee the terms of his license *can be enforced in the State Court,* and that thereby no question is presented for Federal jurisdiction.

POINT III.

THE PATENT CASES REFERRED TO HAVE NEVER BEEN AFFIRMED IN THE SUPREME COURT.

The underlying principle of the *Victor Talking Machine Co.*, against *the Fair* (*ubi supra*), appears to be that a sale of a patented article, accompanied by a stipulation, either expressly agreed to, or in some way brought to the notice of the purchaser, that a resale is limited to certain terms and for a certain price, constitutes a license under the patent law to do one specific act, and unless strictly obeyed, there is some infringement of the patent right reserved to the owner resulting, not from a breach of the contract of sale, but as a direct invasion of the monopoly granted. The logical result of this theory is that the sale of any patented article, and the interpretation of the contract of sale, are subject matters for the exclusive jurisdiction of the Fedreal Courts, and the effect of their judgment would necessarily have to be either the enforcement of the terms of that contract of sale, or the annulment of some pretended license accompanying the same.

The United States Supreme Court has uniformly held that if the suit is brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and the jurisdiction of the Circuit Court can only be maintained upon the grounds of diversity of citizenship.

Excelsior Wooden Pipe Co. v. *Pacific Bridge Co., 185 U. S., 282.*

In *Dale Tile Mfg. Co.* v. *Hyatt, 125 U. S., 46 to 54,* Judge Gray says:

> "It has been decided that a bill in equity in the Circuit Court of the United States by the owner of letters patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the Acts of Congress, by which an appeal to this Court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, chap. 357, Sec. 17, 5 Stat. at L. 124; Rev. Stat., Sec. 69; *Wilson* v. *Sandford, 51 U. S., 99; Brown* v. *Shannon, 61 U. S., 55.*
>
> Following those decisions, it was directly adjudged in *Hartell* v. *Tilghman,* 99 U. S., 547, that a bill in equity by a patentee, alleging that the defendants had broken a contract by which they had agreed to pay him a certain royalty for the use of his invention and to take a license from him, and thereupon he forbade them to use it, and they disregarded the prohibition and he filed this bill charging them as infringers, and praying for an injunction, and account of profits, and damages, was not a case arising under the patent laws, and therefore, the parties being citizens of the same State not within the jurisdiction of the Circuit Court of the United States. And the judges who dissented from that conclusion admitted it to be perfectly well settled 'that where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws.' *99 U. S., 558.*
>
> In the still later case of *Albright* v. *Teas, 106 U. S., 613,* a patentee filed a bill in equity in a State Court, setting up a contract by which he agreed to assign his patent to the defendants and they agreed to pay him cer-

tain royalties, and alleging that the defendants had refused to account for or pay such royalties to him, and had fraudulently excluded him from inspecting their books of account. The defendants answered that the plaintiff had been paid all the royalties to which he was entitled, and that, if he claimed more, it was because he insisted that goods made under another patent were an infringement of his. The Court held that it was not a case arising under the Constitution or laws of the United States, removable as such into the Circuit Court under the *Act of March 3, 1875, Chap. 137, Sec. 2, 18 Stat. at L., 470.*

It was said by Chief Justice Taney in *Wilson* v. *Sandford*, and repeated by the Court in *Hartell* v. *Tilghman*, and in *Albright* v. *Teas*: 'The dispute in this case does not arise under any act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no Act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles.' *10 How., 101, 102; 99 U. S., 552; 106 U. S., 619.* * * *

The decision was based upon the contract between the parties; and the Court did not decide nor was it necessary for the determination of the case that it should decide, any question depending on the construction or effect of the Patent Laws of the United States.

Kinsman v. *Parkhurst, 59 U. S., 289;*
Brown v. *Atwell, 92 U. S., 327.*

In the nearest case to the case at bar decided by the United States Supreme Court a restrictive sale by a licensee was declared to be wholly freed

from such restriction, at least, in so far as the patent laws were concerned.

In *Keeler* v. *Standard Folding Bed Co., 157 U. S., 660,* the syllabus states the gist of the decision as follows:

> "One who buys patented articles of manufacture from one authorized to sell them within the territory of the purchase, becomes possessed of an absolute property in such articles, unrestricted in time or place, and may sell them in other territory of other assignees of the patent, although he purchased them for the purpose of selling them in such other territory."

Mr. Justice Shiras, writing the opinion of the Court, reviews the various cases. He quotes with approval from *Mitchell* v. *Hawley, 83 U. S., 547,* and *Adams* v. *Burke, 84 U. S., 453,* and then reviewing all decided the cases, he says:

> "This brief history of the case shows that in *Wilson* v. *Rosseau, 45 U. S., 688,* and cases following it, it was held that as between the owner of a patent, on the one side, and a purchaser of an article made under the patent, on the other, the payment of a royalty once, or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent, even if the latter should be by law subsequently extended beyond the term existing at the time of the sale, and that in respect of *the time* of enjoyment, by those decisions, the right of the purchaser, his assigns, or legal representatives, is clearly established to be entirely free from any further claim of the patentee or any assignee; that in *Adams* v. *Burke,* 84 U. S., 17 Wall,

453, it was held that, as respects *the place* of enjoyment, and as between the purchaser of patented articles in one specified part of the territory and the assignee of the patent of another part, the right once legitimately acquired to hold, use or sell, will protect such purchaser from any further subjection to the monopoly; that in *Hobbie* v. *Jennison*, 149 U. S., 355, it was held that as between assignees of different parts of the territory, it is competent for one to sell the patented articles to persons who intend, with the knowledge of the vendor, to take them for use into the territory of the other.

Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. *Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question should arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.*

It appears that in *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep., 863, the foregoing case was called to the attention of the Court and it was conceded that if the last sentence meant that the special contracts alluded to could be enforced only like other contracts by an action at law, for a breach, or a bill in equity, as the action might require, it would dispose of the case then under consideration (which is one of the cases relied upon by complainant), "*but*," the Courts says, "*it is not "clear that the Supreme Court meant to exclude "the possibility of a contract so drawn, that by*

"*virtue of a special stipulation therein contained "a breach of the contract should in, and of itself, "makes the wrongdoer an infringer who could be "proceeded against under the patent laws*" (page 865).

It is very clear that the Court displayed great astuteness in extending the scope and operation of the monopoly contrary to the well-established doctrine that a monopoly must be strictly construed against the grantee thereof.

But it is even contended that an infringement of the patent cannot be created by any agreement of the parties no matter how astutely worded, if the act itself does not, standing by itself, infringe the patent.

The Federal Courts have no jurisdiction in patent cases unless an infringement be alleged and proven, and the parties cannot, by *any* agreement, as between themeselves, for the purpose of conferring such jurisdiction. determine certain acts to be infringements, any more than they can agree amongst themselves that in the case of a breach of a contract they should be considered as citizens of different States for the purpose of creating the jurisdictional facts in the United States Courts. The parties cannot by agreement as stated in 116 Fed. Rep., 863, enlarge either the extent of the legislative monopoly, or of the jurisdiction of the Court, and it is very clear that the dictum in the *Keeler case* that such question would arise as a question of contract and not as under the meaning of the patent laws, is not a mere expression of opinion of an individual judge, but is an accurate statement of the law upon the subject.

It is perhaps pertinent to call to the attenion

of the Court that if by the agreement between the parties, craftily worded for that purpose, dealings in patented or protected articles of any kind can be drawn to the exclusive jurisdiction of the Federal Courts, that it constitutes an unprecedented enlargement of the Federal jurisdiction, which would threaten to, and probably would, absorb every action at law or bill in equity, involving the sale of any articles containing any patented feature, or the product of a patented machine, and it would be difficult to imagine any article which at some period in the course of its production, did not come in close touch with some patented machine or process, by reason of which contracts in relation thereto could be wholly removed from the jurisdiction and process of the State Courts.

Such a result was surely not in the contemplation of the Congress which passed the patent laws, or of the framers of the Constitution, and certainly has never received the sanction of the United States Supreme Court.

Point IV.

ARTICLES PRODUCED UNDER PATENTS ARE THE ONLY ONES IN WHICH THE RIGHT CONTENDED FOR HAS EVER BEEN RECOGNIZED.

Appellants do not claim that as to ordinary articles of merchandise, an agreement between the vendor and his vendee becomes attached to the articles itself, in such a manner as to give the

right to injunctive relief to the vendor against purchasers from a purchaser, with or without notice. The agreements in question do not partake of the nature of "covenants running with the land." The law upon this point is clearly stated in *Garst* vs. *Hall, Lyon & Co.*, 179 Mass., 588.

> "It is equally, or perhaps more plain, that the contract contemplated sales by retailers which shall pass an absolute title to the property. The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it or sell it to another. The plaintiff had contracts from his vendees in regard to the price at which they will sell, if they sell at all."

So far, the Court precisely describes the facts prevailing in the case at bar. It then says:

> "If they sell in violation of their contracts with the plaintiff he has a remedy against them to recover his damages (Garst *v.* Harris, 177 Mass., 72.) *This right is founded upon a personal contract alone and it can be enforced only against the contracting party.* To say that this contract is attached to the property and follows it through successive sales which severally pass title is a very different proposition. *We know of no authority nor of any sound principle which will justify us in so holding.* The plaintiff's trade-mark does not give him the rights of a patentee in the property manufactured under a patent. His trade-mark is to secure him and the public from deception and fraud as to origin and source of these goods and of similar goods."

This case is furthermore authority for the proposition that a purchase from individuals who have in fact entered into a restrictive agreement with

the original vendor, is not a fraud upon such vendor's rights, and merely alleging it to be a fraud, without proving facts from which a fraud can be inferred, is insufficient.

In so far as articles manufactured under secret processes are concerned, they differ in no respect from any other articles, as to the enforcement of limitations or restrictions between the parties to the contract of sale.

Park *vs.* Hartman, 153 Fed. Rep., 24.

The cases involving the *disclosure of secrets* by persons in confidential relations have, of course, no application to the case at bar.

Of this class also is the case of *Board of Trade* vs. *Chirstie, Gray and Stock Co.*, 198 U. S., 236, cited at page 35 of appellant's brief, in which Judge Holmes, writing the opinion of the Court, says:

> "The plaintiff does not lose its rights by communicating the results to persons, even if many, *in confidential relations to itself under a contract not to make it public*, and strangers to the trust will be restrained from getting that knowledge by inducing a *breach of trust* and using knowledge obtained *by such a breach.*"

The case relied upon by appellants in their sixth point (page 37) to establish the proposition that the rules applied to patented articles and secret processes, apply also to cases of copyrights, do not support that contention. On the contrary, *Werkmeister* vs. *American Lithographing Co.*, 134 Fed.

Rep., 321, extensively quoted, both in reasoning and in principle, supports the contrary theory.

Judge Townsend, speaking for the Court, says:

> "A copyright is an incorporeal right to *print and publish.* It is a property in notion without corporeal or tangible substance."

Further on he says:

> "The nature of the property in question in large measure determines the extent of the public right. *Thus in the case of a book, ordinarily the sole practical right of the author is in the right to multiply copies.*"

On page 39 appellants' brief quotes from that opinion:

> "A publication under such restrictions is a limited publication, and no rights inconsistent with, or adverse to, such restrictions are surrendered."

And—

> "The same distinctions are observed, and the same rules apply in the cases where statutory copyright has been obtained."

If these same rights existed *before* copyright, as contended for by the appellants, then the copyright statutes neither enlarged those rights, nor created new remedies for them, and the remedy for an infraction of those rights would necessarily be governed by the same rules of law or equity as on the breach of an ordinary contract, and *not* under the copyright statutes.

That very case, followed and approved as before pointed out, *Bill Publishing Co.* vs. *Smyth* and

Harrison vs. *Maynard, supra,* and requires identity of ownership in the copyright and in the copies of the copyrighted book, to invoke the protection of the statute for any other right than that of recopying.

Point V.

COMPLAINANTS' PROOF DISCLOSES THAT WHATEVER RIGHT OF ACTION, IF ANY, EXISTS IS THE DIRECT OFFSHOOT OF THE ILLEGAL AGREEMENTS OF AN ILLEGAL COMBINATION.

Under the decision of Mr. Justice Lacombe, the defendants' allegation, charging the complainants with being parties to an alleged illegal combination, which, for the purpose of controlling the trade and monopolizing interstate commerce, had passed unlawful rules and entered into unlawful agreements, was eliminated from their answer, and in consequence they were prohibited from offering proofs to sustain such allegations.

But in order to prove the allegations of the bill of complaint, and to sustain their cause of action, the complainants found it necessary as the sole proof of an infringement on the part of the defendants, to establish the formation of that very combination and the adoption of its resolutions and the making of the agreements exacted by it.

On the principle that *ex turpi contractu non oritur actio,* the validity of this combination, and its agreements, can be questioned in a court of equity, without being affirmatively alleged as a

defense. The Court will not lend itself to the enforcement of an agreement which is clearly contrary to law and good morals, when the cause of action alleged exists solely by reason of that agreement.

McMullen *v.* Hoffman, 174 U. S., 639, page 654 and cases cited.

> "Whenever the illegality appears whether "the evidence comes from one side or the "other the disclosure is fatal to the case. No "consent of the defendant can neutralize its "effect."
>
> Coppell *v.* Hall, 7 Wall, 542, 558.

The complainants' clerk Stolle, distinctly stated that no individual contracts were made with purchasers, but that the complainants, on their bill heads and catalogues, printed a notice to the effect that all their books were sold subject to the rules and regulations of the American Publishers' Association. Mr. Emory, the manager of the Publishers' Association testified that a pledge was not always exacted from purchasers; that it was only demanded under special circumstances, and then the pledge consisted of a *promise to the American Publishers' Association* to maintain prices and observe its rules.

There is not the slightest scintilla of evidence that there was any contract of any kind, directly between the complainants and any purchaser from them, and there was no pretense of any contract directly with the defendants, who were well known throughout the trade, as testified to by Mr. Emory and, in fact, were widely advertised by the Publishers' Association, as price-cutters with whom no dealings of any kind should be had.

Whatever breach was committed by any purchaser from the complainants, was a breach not of any contract with the complainants, but of a promise to the American Publishers' Association or its adjunct, the Booksellers' Association. Whatever cause of action, therefore, exists, springs, not from any contract made by the complainants directly with their customers, or the defendants, but from a pledge or promise made by the wholesale dealers to the American Publishers' Association, to observe its rules, or by the defendants themselves in refusing to abide by such rules. The origin, intent and scope of the resolutions, and of the combination which passed them, are therefore open to inquiry for the purpose of attacking their legality.

The State Court decided that the combination controlling the supply of books, because it also controlled uncopyrighted books, was illegal, and contrary to public policy, and discarding for the moment the theory that the owners of protected books can enter into combinations with each other, which are prohibited to the owners of unprotected books, it is very clear that in addition to the unlawful character fastened upon it by the State Law, it is contrary to both the letter and spirit of the Federal Anti-Trust Law.

Judge Harlan, in the prevailing opinion of the United States Supreme Court in the recent case of *Northern Securities Company against the United States, 193 U. S., 197*, after reviewing the cases, sets forth categorically certain propositions, which he considers plainly deducible, as to the application of the Anti-Trust Law. These are in part as follows (page 331):

"That the act embraces and declares to be

illegal *every* contract, combination or conspiracy, in whatever form, of whatever nature, *and whoever may be the parties to it,* which directly or necessarily operates in restraint of trade, or commerce among the several States, or with foreign nations.

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by *any* combination, conspiracy or monopoly upon such trade or commerce. * * *

That combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained are equally embraced by the act. * * * That the natural effect of competition is to increase commerce and an agreement whose direct effect is to prevent this play of competition restrains, instead of promoting, trade and commerce. * * *

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce."

If competition is desirable and promotes commerce, as stated by Judge Harlan, then the underlying scheme of the Association, and the agreements of their respective members, are wholly indefensible and contrary to the statute.

But the complainants contend that the grant of monopoly, which they enjoy, for the publication and sale of one copyrighted book, includes a privilege denied to the owners of any other species of property; that is, to engage in any combination or conspiracy with the owners of other Federal monopolies, free from the control of, or interference by, either the State or the Federal Courts,

completely emancipated, as it were, from any and all trade regulations which are applied to unprotected articles of commerce by the statute law or the common law.

Section 1 of the Sherman Anti-Trust Law (Fifty-First Congress, Vol. 26, page 209), says:

> "Every contract, combination in the form of a trust or otherwise or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal. *Every* person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, etc., etc."
>
> Section 2. "*Every* person who shall monopolize or attempt to monopolize or combine or conspire with *any* other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor and on the conviction thereof, etc., etc."

In order to remove the combination of owners of copyrights, patents, etc., from the operation of the Federal Anti-Trust Law, the Court must interpret the statute as meaning not "*Every* contract, combination or conspiracy in restraint of trade, etc.," but "Every contract, combination or conspiracy *in articles not covered by copyrights or letters patent, etc.,*" And in Section 2 instead of "*Every* person who shall monopolize, etc.," there must be interpolated "Every person *except the owner of a patent or copyright who shall monopolize,* etc."

Assuming that the grant of monopoly in patent and copyright laws enabled the owners of different copyrights and of different patents to enter into a combination, that right has clearly been taken and

destroyed, if it ever existed, by the Anti-Trust Law.

It must, of course, be conceded that in an action for the infringement of a patent, or a copyright, where the infringement consists of the manufacture of a similar article without the sanction of law, and in violation of the direct words of the patent granted, a defense that the party who seeks to establish his patent is guilty of some wrong, cannot be sustained. But there is a clear distinction between enforcing the monopoly granted by the patent, and enforcing the terms of some contract or agreement made with others, which is not contained in the patent itself, and constitutes an infringement if at all, *by reason of some extrinsic agreement*. In every case relied upon by the complainant as authority for their position, this distinction is emphasized. In *National Folding Box & Paper Co.* vs. *Robertson, 99 Fed. Rep., 985*, the complainant alleged an infringement in the manufacture of paper boxes. That the acts complained of were an infringement had been established in another action. The sole defense was that the plaintiffs were members of an illegal combination to monopolize, manufacture and trade in paper boxes. This was overruled, and properly so, on the ground that the plaintiff did not lose the benefit of the direct monopoly contained in his patent because he may have been guilty of some illegal act in some other connection. But the Court quotes and cites with approval the language of Judge Wallace of this circuit in *Strait* vs. *National Harrow Co., 51 Fed. Rep., 819*, as follows:

> "If the defendant had brought suit against the plaintiffs for some breach of contract or violation of its alleged rights founded upon

> the combination against them, it might become pertinent to inquire into the character of the combination and ascertain whether the Court would enforce any rights growing out of it."

The language of Judge Wallace is in every detail applicable to the case at bar in so far as this defense is concerned.

In *National Harrow Co.* vs. *Hench, 76 Fed. Rep., 667, affirmed by the Circuit Court of Appeals, 83 Fed. Rep., 36,* the Court seems to have acted on this principle of refusing to enforce any portions of a *combination* that was illegal, even though in that particular case, the action was brought by the owner of a patent against its licensee, and the Circuit Court of Appeals, 83 Fed. Rep., 336, makes use of this language:

> "Patents confer a monopoly as respects property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. *Patented property does not differ in this respect from any other.*"

It is not denied that if a pirated edition of any of the work covered by the complainant's copyright were put upon the market, complainant would have the right to restrain the sale thereof, and enforce the penalties granted by the statute. Nor would in such case a defense that it was a party to an illegal combination be pertinent, but this is true only for the reason that in the enforcement of its rights it would not be enforcing the unlawful rules and regulations of an unlawful combination. Its rights would not be dependent in such case upon any *contract* unlawful in its character,

but solely upon the copyright issued pursuant to law.

If the theory set forth by Judge Wallace is correct, then whenever a party to an unlawful agreement seeks to enforce a right or a remedy springing from the agreement, he can be successfully met with proof of the illegality of that agreement.

And finally in the case of *Bement* vs. *National Harrow Co., 186 U. S., 70,* the Court clearly intimates in the final paragraph of the opinion that if a case had been presented of a *combination or agreement between the various owners of patents* to control the price of harrows, that such agreement would have been unlawful, but the Court says *there being no finding that contracts were entered into between the parties or that a combination between the manufacturers had been effected, that it would not make such presumption for the purpose of reversing the decision or finding to that effect.*

To give the owner of a copyright or a patent liberty to enter into combinations and agreements with the owners of other patents, or copyrights, which in unprotected articles are unlawful and in many jurisdictions criminal, would be a curtailment of the rights of the public, which never was, and never could have been intended. The opinion of Judge Ray in *Bobbs-Merrill Co.* v. *Straus, 139 Fed. Rep., page 158,* is very convincing upon this point.

Point VI.

IT IS RESPECTFULLY SUBMITTED THAT THE DECREE APPEALED FROM SHOULD BE DISMISSED WITH COSTS.

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JOHN G. CARLISLE,
EDMOND E. WISE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Office Supreme Court, U. S.
FILED.
MAR 2 1908
JAMES H. McKENNEY,
CLERK

No. 204.

OCTOBER TERM, 1907.

CHARLES SCRIBNER and ARTHUR H. SCRIBNER trading as CHARLES SCRIBNER'S SONS,

Appellants,

against

ISIDOR STRAUS and NATHAN STRAUS, individually and as co-partners trading under the name of R. H. MACY & CO.,

Appellees

No. 205.

OCTOBER TERM, 1907.

CHARLES SCRIBNER'S SONS Incorporated,

Appellants,

against

ISIDOR STRAUS and NATHAN STRAUS individually and as co-partners trading under the name of R. H. MACY & CO.

Appellees.

BRIEF FOR APPELLEES.

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Supreme Court of the United States,

CHARLES SCRIBNER'S SONS, INCORPORATED,
Appellants,

against

ISIDOR STRAUS & ANO.,
Appellees.

NUMBER 205.

October Term, 1907.

APPEAL FROM DECREE OF THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT.

Brief for Appellees.

The questions involved on the appeal in this case are precisely the same as in Charles Scribner *et al.*, against Isidor Straus *et al.*, No. 204, on the present calendar. The complainant is a corporation which succeeded to the business of the complainants in the other case. The copyrights which form the subject matter of this action are different from the ones enumerated in the other case By stipulation, however, all the proofs taken in the previous case were accepted as the proofs in

this case. The same questions were presented in both cases and they were tried together.

POINTS.

For the reasons set forth in appellee's brief in No. 204, the decree appealed from should be affirmed with costs.

EDMOND E. WISE,
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JOHN G. CARLISLE,
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Of Counsel.